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CANADIAN CRIMINAL CASES

ANNOTATED

A SERIES OF REPORTS OF IMPORTANT DECISIONS IN
CRIMINAL AND QUASI-CRIMINAL CASES IN CAN-
ADA UNDER THE LAWS OF THE DOMINION AND
OF THE PROVINCES THEREOF, WITH SPE-
CIAL REFERENCE TO DECISIONS UNDER
THE CRIMINAL CODE OF CANADA,
1906, IN ALL THE PROVINCES;
WITH ANNOTATIONS, A
TABLE OF CASES CITED
AND A DIGEST OF
THE PRINCIPAL
MATTERS

EDITED BY
W. J. TREMEEAR
OF THE TORONTO BAR

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CASES REPORTED, VOL. XXIII.

- AIKENS, R. v.** (N.S.)
Certiorari—Summary conviction bad on its face—Filing substituted conviction—Locality of offence not shewn—Territorial jurisdiction. 467
- ALLEN, R. v.** (N.S.)
Non-support of wife or children—Summary proceedings — Wife as witness against husband — Amending statutes — New section introduced with number and letter designation—Criminal Code, sec. 242A. 67
- ATKINSON, R. v.** (MAN.)
Intoxicating liquors—Drunkenness on Indian reserve—Imprisonment at hard labour — Summary conviction Under Indian Act (Can.). 149
- BEAMISH v. RICHARDSON.** (CAN.)
Brokers—Grain exchange—Sales on margin—Wagering contracts—Cr. Code, sec. 231—Clearing house—Option deals. 394
- BELMONT, R. v.** (QUE.)
Justice of the peace—Jurisdiction also as summary trial magistrate—Summary conviction or summary trial procedure. 89
- BHAGWAN SINGH, RE.** (B.C.)
Habeas corpus—Applicant out on bail—Non-disclosure. 5
- BIRKENSTOCK, R. v.** (SASK.)
Bribery. 235

- BOARDMAN, R. v. (ALTA.)
Punishment of whipping—Statutory directions for medical supervision—Sentence—Illegality of direction as to time of whipping—Appeal—Rendering modified judgment. 191
- BOOTH, R. v. (ONT.)
Disorderly house—Charge of keeping—Summary trial without option—Sentence—Excessive fine on summary trial—Cr. Code, sec. 781. 224
- BRADY, R. v. (B.C.)
Appeal—Locality of offence—Magistrate acting for two counties—Jurisdiction of County Court on appeal—Venue—Criminal prosecutions—Non-indictable offences—Provincial law. 35
- BURGESS, R. v. (N.S.)
Libel and slander—Criminal information for libel—Application for leave to file. 424
- BURNETT, R. v. (See Price and Burnett.) (MAN.) 285
- CALGARY AND CUDDY, WAH KIE v., No. 1. (ALTA.)
 (See Wah Kie v. Cuddy.) 325
- CALGARY AND CUDDY, WAH KIE v., No. 2. (ALTA.)
 (See Wah Kie v. Cuddy.) 383
- CANADIAN PACIFIC R. CO., R. v. (ONT.)
Constitutional law—Railway companies—Smoke regulation—Municipal by-laws or commission control. 487
- CARDELL, R. v. (ALTA.)
Procuring—Prostitution—Cr. Code 216. 271
- CHAMRYK, RE. (MAN.)
Aliens—Alien enemies—Arrest by military authority. 275

CHUPAK, R. v. (See Kolenczuk, R. v.) (SASK.) 265

CLINGMAN, R. (See Rabinovitch, R. v.) (MAN.) 496

COADY, R. v. (N.S.)

Justice of the peace—Jurisdiction—N.S. Temperance Act. 434

CODY, R. v. (N.S.)

Justice of the peace—Appointment—Territorial jurisdiction—Intoxicating liquors—Trial of offenders—Exclusive jurisdiction of town stipendiary magistrate—Nova Scotia Temperance Act, 1900—Unlawful sales—Provincial criminal law. 211

COOK, R. v. (No. 1). (N.S.)

Trial—Counsel for defence—Stating or reading the law to the jury—Courts—Terms and sessions—Power to change dates as to criminal Courts—Constitution and organization of Court. 50

COOK, R. v. (No. 2). (N.S.)

Reprieve—Death sentence—Discretion of trial Judge—Proposed appeal to Privy Council from provincial Court of Appeal. 86

CORRIVEAU v. SIMARD. (QUE.)

Intoxicating liquors — Unlawful sales — Temperance drinks—Percentage of alcohol—Quebec License Law. 156

COUNTY JUDGE'S CRIMINAL COURT, R. v.;

RE WALSH. (N.S.)

Speedy trial procedure—Electing trial without jury—Effect of indictment. 7

- CRUIKSHANKS, R. v. (ALTA.)
Justice of the peace—Sitting at request of another justice—Dentists—Unlawful practice—Mechanical dentistry—License—Several attendances on one person—Summary convictions—Procedure on charge of second offence with added penalty. 23
- CUDDY, WAH KIE v. (No. 1). (ALTA.)
 (See Wah Kie v. Cuddy.) 325
- CUDDY, WAH KIE v. (No. 2). (ALTA.)
 (See Wah Kie v. Cuddy.) 383
- DAIGLE, R. v. (Que.)
False pretences—Elements of offence—Fraudulent contract—Pretended stock subscription—Preliminary enquiry—Replacement of magistrate—Rights of accused—Waiver—Consent to admit depositions in trials of others similarly concerned—Information treated as formal charge or indictment—Speedy trial—Direction for bail in lieu of committal for trial—Record—Electing trial without jury—Accused not committed for trial but bailed to answer to jury Court. 92
- DAVIS, R. v.; EX PARTE MIRANDA. (N.B.)
Certiorari—Jurisdiction—Want or insufficiency of evidence—Liquor law taking away certiorari—Weight of evidence. 33
- EDMUNDS, R. v. (ALTA.)
Appeal—Criminal law—Review of conviction on question of law—Sufficiency of evidence. 77
- EDWARDS, R. v. (Que.)
Bail and recognizance—Discharge—Taking accused in charge after conviction—Change of sentence—Calling upon the recognizance—Ex parte judgment—Attack—Quebec practice—Certificate of forfeiture—Conclusiveness—Courts—Jurisdiction on estreating. 296

- ELLIOTT, RE.** (ONT.)
Certiorari—Notice of motion to quash conviction—Time Limit—Waiver—Notice of motion served too late—Enlargement of motion by consent. 162
- FARRELL, R. v.** (See *Romer, R. v.*) (QUE.) 235
- FAUX, R. v.** (ONT.)
Municipal corporations—By-law against drunkenness in public places—Remedying omission to affix seal—Conviction for offence prior to sealing. 75
- FONTAINE, R. v.** (ONT.)
Witnesses—Corroboration—Criminal charge—Indecent assault. 159
- FRASER, R. v.** (ONT.)
Appeal—Indictment—Status of private prosecutor—Recognizance to prefer indictment — Prosecution assumed by Crown. 140
- GALPIN, SMITH v.** (See *Smith v. Galpin.*) (ONT.) 318
- GEORGET, R. v.** (SASK.)
Appeal—From summary conviction—"Next sittings" under Cr. Code, sec. 749—Nearest place of sittings—District Court (Sask.). 341
- GILLIS, R. v.** (Y.T.)
Estoppel—Inconsistent acts in judicial proceeding—Plea of guilty as bar to future contest of facts on appeal. 160
- GOVERNOR OF CITY PRISON, R. v.**
 (Ex parte *Green.*) (N.S.)
Place of imprisonment—Common jail. 293
- GOULET, RICHARD v.** (See *Richard v. Goulet.*) (QUE.) 327

- GRAND TRUNK R. CO., R. v. (QUE.)
Railways—Obstruction of street crossing—Standing cars—Operation of gates. 80
- GREEN, EX PARTE. (See Governor of City Prison). (N.S.) 293
- GREIG, R. v. (SASK.)
Bail and recognizance—Amendment of order or making new order—Sufficiency of bail—Duty of Judge ordering bail—Bail under Cr. Code, sec. 698—Justification of bail in criminal matters—Saskatchewan practice—Submitting names and particulars of bondsmen—Jurisdiction after committal when accused moved to jail out of district for safe custody. 352
- GUAY, R. v. (QUE.)
Speedy trial. without jury—Changing option—Evidence—Record of court holding speedy trial—Recital of facts affirming jurisdiction—Speedy trials clauses—Option of non-jury trial—Cr. Code, sec. 826. 243
- HAGEL AND WESTLAKE, R. v. (MAN.)
Witnesses—Cross-examination—Direction of Court to call alleged associate in the offence. 151
- HAYNES, R. v. (N.S.)
Trial—Homicide—Instruction to jury—Prisoner's letter requesting false answer to enquiry—Explaining possession of money—Inaccuracy in Judge's charge—Prejudice. 101
- HELLIWELL, R. v. (ONT.)
Gaming—Pool selling—Betting—Jurisdiction of Police Magistrate—Summary trial—Consent. 146
- HOGG, R. v. (SASK.)
Bribery—Corrupt offer for official influence—Sale or purchase of official position—Reward for assistance to procure. 228

- HOLDERMAN, R. v.** (SASK.)
*New trial—Misdirection as to law—Chattel mortgage—
Future crop—Seed-grain mortgages in Saskatchewan—
False pretences—Inferential pretence without express
words.* 369
- HOWES, R. v.** (SASK.)
*Secret commissions—Employee receiving secret commis-
sion—Criminal offence—Railway freight conductor
spotting cars.* 358
- HUCKLE, R. v.** (ONT.)
*Partial remission of sentence for good conduct in prison
—Power to revoke or forfeit—Habeas corpus—Peniten-
tiary regulations of 1898.* 73
- HURST, R. v.** (ALTA.)
*Arrest—Illegal arrest on first charge—Conviction made
on second charge only—Dismissal of first charge.* 389
- JOHNSON, R. v.** (See *Romer, R. v.*) (QUE.) 235
- JOHNSON (JEANNETTE), R. v.** (Y.T.)
Disorderly house—Offence of keeping. 136
- KOLENCZUK, R. v.** (SASK.)
*Vagrancy—Essentials of offence—Wanderer without
means of subsistence.* 265
- LABRIE, R. v.** (SASK.)
*Intoxicating liquors—Unlawful sales—Liability of
principal for offence of agent.* 351
- LANGLOIS, R. v.** (QUE.)
*Gaming—Automatic gum-vending machine—Free
checks with purchases—Inducement to re-play each
check for more checks or blank—Whether gaming es-
tablished.* 43

LEMELIN, R. v.

(QUE.)

Appeal—Leave to appeal—Conviction—Sufficiency of particulars. 171

LOUIE CHONG, R. v.

(ONT.)

Assault—Indecent assault—Intent of ambiguous act shewn by words spoken—Cr. Code, sec. 292. 250

MARCEAU, R. v.

(ALTA.)

Disorderly houses—Offence of keeping—Stating place of offence. 456

MAY, R. v.

(B.C.)

Witnesses—Crown discrediting its own witness on criminal trial—Adverse witness—Canada Evidence Act, sec. 9—Trial—Comment on failure of accused to rebut testimony. 469

McCLAIN, R. v.

(ALTA.)

Preliminary inquiry—Caption to depositions—Appeal—Question of law—Corroborative evidence—Theft—Recent possession—Evidence—Witnesses—Competency—One of two jointly charged pleading guilty—Names of Crown witnesses—Formal charge where no grand jury system—Disclosing to accused before trial names of witnesses against him—Crown witnesses at preliminary inquiry. 488

McDERMOTT, R. v. (Annotated).

(SASK.)

Appeal—From summary conviction—Service of notice of appeal—Recognizance—Fine—Cr. Code, sec. 750. 252

MICHUS, O'SULLIVAN v.

(ALTA.)

See O'Sullivan v. Michus. 169

MINCHIN v. THE KING.

(CAN.)

Theft—Embezzlement—Various defalcations as one continuous act—Evidence disclosing a collateral crime to that charged—Defendant's bank account—Relevancy on charge of theft of money—Appeal—To Supreme Court (Can.)—Criminal case where dissent in Court below.

414

MIRANDA, EX PARTE.

(N.B.)

Certiorari—Jurisdiction—Want or insufficiency of evidence—Liquor law taking away certiorari—Weight of evidence.

33

MORRIS, ROBINSON v. (See Robinson v. Morris) (ONT.) 209

MORTON, R. v.

(SASK.)

Summary trial—Jurisdiction absolute in certain provinces—Sentence and imprisonment—Hard labour.

172

MULVIHILL v. THE KING.

(Annotated) (CAN.)

Appeal—Questions of law—Refusal to postpone trial—Supreme Court of Canada—Objection that appeal not competent—Cr. Code (1906), sec. 1024.

194

NASH, R. v.

(ALTA.)

Perjury—Statutory corroboration—"Material particular"—Cr. Code sec. 1002—Knowledge of falsity—Prisoner's testimony on perjury charge—Inconsistencies with former testimony.

38

NERO, R. v.

(ONT.)

Intoxicating liquors—Keeping for sale—Statutory presumptions.

167

O'SULLIVAN v. MICHUS.

(ALTA.)

Intoxicating liquors—Unlawful sales—Liability of proprietor or occupant—Employee acting as customer's agent to buy.

169

- OXLEY, R. v. (N.S.)
Homicide—Accidental shooting—Hunting in close season. 262
- PEART, R. v. (ONT.)
Summary convictions—Amending commitment—Cr. Code sec. 1121—Justice of the peace—Protection order on quashing warrant—Cr. Code, sec. 1131. 259
- PRENTICE, R. v. (ALTA.)
Witnesses—Privilege—Authorization of solicitor's Act—Trial—Discretion—Re-calling witness on collateral issue as to credit—False pretences—Fraudulently inducing execution of valuable security. 436
- PRICE AND BURNETT, R. v. (MAN.)
Election against summary trial by magistrate—Subsequent election of speedy trial. 285
- PROKOPATE, R. v. (SASK.)
Summary trial—Assault occasioning bodily harm—Trial without consent in Saskatchewan—Appeal from summary conviction—Ten days' limitation—Shewing correct date of conviction. 189
- QUONG WING v. THE KING. (CAN.)
Constitutional law—Regulation of business—Employment of white females in places of business of Chinese or other Orientals—Provincial law prohibiting with penalties—Aliens—Naturalization—Effect—Discrimination as to civil rights. 113
- RABINOVITCH AND CLINGMAN, R. v. (MAN.)
Secret commission—False statement in writing—Collusive fixing of price by employee—Witnesses—Corroborative testimony—Prior fact otherwise irrelevant—Admissibility. 496

- RAE, R. v.** (ONT.)
Bail and recognizance—Capital offence—Trial of murder charge postponed by Crown. 266
- RAPP, R. v.** (ONT.)
Sentence and imprisonment—Running of sentence—Convict allowed at liberty on bail pending appeal—Quashing of appeal. 203
- RICHARD v. GOULET.** (QUE.)
Malicious prosecution—Termination—Quashing on technical grounds—Nolle prosequi—Reasonable and probable cause—Advice of counsel—True bill found—Effect on subsequent action for damages—Indictment information complaint—Irregularity or insufficiency—Amendment of irregular indictment. 327
- RICHARDSON, BEAMISH v.** (Can.)
(See *Beamish v. Richardson.*) 394
- ROACH, R. v.** (ONT.)
Indecency—Summary conviction—Uncertainty and multiplicity—Limitation of charge and evidence to one specific offence—Certiorari—Practice as to costs—Alternative procedure of appeal available. 28
- ROBINSON v. MORRIS.** (ONT.)
Sentence and imprisonment—Running of sentence on summary conviction. 209
- ROMER ET AL, R. v.** (QUE.)
Summary conviction—Appearance by counsel only—Summary trial without consent—When magistrate to declare procedure—Accused to be personally present—Statutes—Interpretation—Recurring phrases in same statute—Protection of rights of accused—Full answer and defence. 235

- ROWENS, R. v. (ONT.)
Bail and recognizance—Treasonable offence. 340
- SCHELLER, R. v. (SASK.)
Witnesses — Corroboration — Charge of forgery — Cr. Code 1906, sec. 1002. 1
- SCHILLING, R. v. (SASK.)
Dentists — Practising without license — Summary conviction—Imprisonment in default of paying fine—Special Act making fine payable to magistrate — Formal conviction—Certiorari—Directing amendment of summary conviction — Stating the offence — Practising dentistry. 380
- SCHURMAN, R. v. (SASK.)
Trial—Instruction as to reasonable doubt—New trial—Misdirection as to reasonable doubt. 365
- SHAJOO RAM, R. v. (B.C.)
Oaths—In form customary with persons of witness' race or belief. 334
- SIMARD, CORRIVEAU v. (QUE.)
 (See Corriveau v. Simard.) 156
- SMITH v. GALPIN. (ONT.)
Intoxicating liquors—Unlawful sales—Shop license—Minimum quantity in unbroken packages. 318
- “STADIUM” (THE), R. v. (QUE.)
Sunday — Sports and amusements — Skating rink — Franchise to club under Quebec statute. 84
- STECKLEY, R. v. (ONT.)
Certiorari—Summary trial for indictable offence—Crown's admission. 263

SULLIVAN, R. v.

(N.S.)

Costs—Certiorari proceedings—Offence against town ordinance—Criminal matter—Unopposed motion. 222

SULLIVAN, R. v.

(Y.T.)

Bail and recognizance—Notice to sureties—Default of appearance—Adjournment of preliminary enquiry by consent for more than eight days—Waiver—Enforcement and estreat of recognizance—Calling the bail—Certificate of default. 174

SWETT, R. v.

(ALTA.)

Habeas corpus—Notice of motion—Alberta Crown Rules—Serving notice on Attorney-General—Status of local agent—Summary convictions—Irregular plea—Statement of accused in answer to charge—Evidence—Disproving plea of guilty stated in summary conviction. 272

TALLY, R. v.

(ALTA.)

Indictment, information and complaint—Sufficiency of description of offence—Common assault—Amendment of information—Re-swearing—Summary conviction—Irregularity in information—Waiver by failure to object—Defect in information cured by depositions—Territorial jurisdiction of magistrate—Inconvenient place of trial—Justice of the peace—Exclusive jurisdiction of first justice taking cognizance of case—Implied request to second justice to act—Trial—Two persons separately charged on identical evidence—Intermixing of trials—Form—Date of offence—Continuance and adjournment—Discretion of magistrate. 449

TAMBLYN v. WESTCOTT.

(ALTA.)

Evidence—Judicial records—Termination of criminal prosecution—Malicious prosecution—Proof without production of record. 391

- THOMPSON, R. v. (N.S.)
Intoxicating liquors—Trial of offender—Absent defendant—Plea of guilty by counsel. 463
- UNITED STATES v. TOUNDER. (N.S.)
Extradition—Stealing—Restitution of money taken from prisoner when arrested—Proving identity with money stolen. 76
- VERDI, R. v. (N.S.)
Intoxicating liquors—Sales to prohibited persons—Indian Act (Can.)—Sale by employee of license holder to person of prohibited class—Criminal liability of employer—Enforcement of fine—Costs of commitment. 47
- WAH KIE v. CALGARY AND CUDDY. (ALTA.)
Gaming—Means of resisting police search—Common gaming house—Cr. Code, sec. 641. 325
- WAH KIE v. CUDDY (No. 2). (ALTA.)
Search and seizure—Search warrant on gaming-house charge—Producing warrant. 383
- WALKER, R. v. (QUE).
Criminal Courts—Status of Police Magistrate—"Sessions" Courts at Montreal—Bail and recognizance—Threats—Sureties to keep the peace—Breach of condition—Estreat—Parties to proceedings—Increased punishment because of breach of recognizance. 179
- WALSH, RE. (N.S.)
Speedy trial procedure—Electing trial without jury—Effect of indictment. 7
- WATCHMAN, R. v. (Sask.)
Theft—Receiving stolen goods—Alleging the theft. 362

WEISS, R. v.

(SASK.)

*Indictment, information and complaint—Requisites—
Leave to prefer formal charge—Discretion of Attorney-
General in Alberta and Saskatchewan—Stay of pro-
ceedings—Criminal prosecution—Cr. Code, sec. 962.* 460

WESTCOTT, TAMBLYN v.

(ALTA.)

(See Tamblyn v. Wescott.)

391

WESTLAKE, R. v. (See Hagel.)

(MAN.) 151

WILLIAMS, R. v.

(ONT.)

*Evidence—Corroboration — Accomplice — Indecency
with male person—Cr. Code (1906), sec. 206.* 339

WILSON, R. v.

(ALTA.)

*Continuance and adjournment—Summary trial by
magistrate—Adjournment sine die for deliberation.* 256

CASES CITED, VOL. XXIII.

Acaster, R. v., [1912] 1 K.B. 488.....	71
Ackers, R. v. (No. 3), 16 Can. Cr. Cas. 222.....	450, 454
Aho, R. v., 8 Can. Cr. Cas. 453, 11 B.C.R. 114.....	470, 477, 485
Allen v. The King, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331.....	470, 481, 486
Allen, R. v., 23 Can. Cr. Cas. 67.....	69, 72
Alward, R. v., 21 O.R. 519.....	28, 32
Amstell v. Alexander (1867), 16 L.T.N.S. 830.....	475
Anderson v. Bank of B.C., L.R. 2 Ch. 644.....	448
Apothecaries Co. v. Jones, [1893] 1 Q.B. 89	26
Armstrong, R. v., 18 Can. Cr. Cas. 72.....	23
Atty.-Gen. v. Beaulieu, 3 L.C.J. 117.....	296, 302
Atty.-Gen. v. Hobert (1631), Cro. Car. 210	208
Atty.-Gen. v. Scully, 6 Can. Cr. Cas. 167, 4 O.L.R. 394.....	391, 393
Atty.-Gen. of Manitoba v. Manitoba License Holders' Assoc., [1902] A.C. 73	129, 130
Atty.-Gen. for Ontario v. Atty.-Gen. for the Dominion, [1896] A.C. 348	130
Audley's (Lord) Case, 1 St. Tr. 393	71
Azire, R. v., 1 Str. 633	70
Baird, R. v., 13 Can. Cr. Cas. 240.....	160, 161
Balls, Reg. v., L.R. 1 C.C.R. 328, 40 L.J.M.C. 148.....	421
Banks, R. v., 1 Can. Cr. Cas. 370.....	223
Barker, R. v., 1 East 188	362, 364
Barnardo v. Ford, [1892] A.C. 325, 61 L.J.Q.B. 728.....	6
Baronet, R. v., 1 E. & B. 1.....	356
Barrett's Bail, Re, 7 Can. Cr. Cas. 1, 36 N.S.R. 135.....	174, 177
Bathard v. London Sewers Commrs., 54 J.P. 135	347
Baxter v. Gordon, 13 O.L.R. 598.....	321, 391, 393
Beale, R. v., 1 Can. Cr. Cas. 235, 11 Man. L.R. 448.....	424, 431
Beardmore, R. v., (1836), 7 C. & P. 497.....	202
Bechtel, R. v., 19 Can. Cr. Cas. 423, 5 D.L.R. 497.....	488, 493
Bechtel, R. v., 21 Can. Cr. Cas. 40, 9 D.L.R. 552.....	488, 493
Beemer v. Beemer, 9 O.L.R. 69.....	391, 393
Begeotas, R. v., 22 Can. Cr. Cas. 113, 8 D.L.R. 1032.....	169, 170
Belmont, R. v., 23 Can. Cr. Cas. 89.....	236, 239, 240
Birney, R. v., 3 Can. Cr. Cas. 339.....	358
Bissell, Reg. v., 1 O.R. 514.....	71, 72
Bleasdale, R. v., 2 Car. & K. 765.....	421
Blythe, R. v., 15 Can. Cr. Cas. 177, 19 O.L.R. 386.....	194, 198
Bole, R. v., 9 Can. Cr. Cas. 500.....	179
Boon v. Howard (1874), L.R. 9 C.P. 277.....	126
Bowman, R. v., 2 Can. Cr. Cas. 89.....	160, 161

Bowen, Reg. v. (1840), 9 C. & P. 509.....	268
Boyes, Reg. v. (1861), 1 B. & S. 311.....	4
Boyle, R. v. (1914), 3 K.B. 339.....	358
Brady (Effie), Re, 21 Can. Cr. Cas. 123, 10 D.L.R. 424.....	265
Brooks, R. v., 11 Can. Cr. Cas. 188, 11 O.L.R. 525.....	93
Broughton v. Dickson, 21 L.J.Q.B. 256.....	332
Brown, R. v., 17 L.J.M.C. 145.....	245
Brown v. Glenn, 16 Q.B. 254.....	387
Burdell, R. v., 10 Can. Cr. Cas. 365, 11 O.L.R. 440.....	477
Burke, R. v., 24 Ont. R. 64.....	19, 245
Burns' Bail, Re, 17 Can. Cr. Cas. 292.....	174, 177
Burtress, R. v., 3 Can. Cr. Cas. 536.....	172, 173
Butler, R. v., 8 L.R. Irish 39, 14 Cox C.C. 530.....	356
Cairns v. Choquet, 3 Que. P.R. 25.....	256
C.P.R., R. v., 14 Can. Cr. Cas. 1, 1 A.L.R. 341.....	456, 459
C.P.R. v. The King (1907), 39 Can. S.C.R. 476.....	488
C.P.R. v. Notre Dame de Bonsecours, [1899] A.C. 367.....	487, 488
Cantillon, R. v., 19 O.R. 197.....	380, 382
Casano, R. v., 5 Esp. 231.....	228, 231
Chaney v. Payne, 1 Q.B. 712.....	467, 469
Chapman, R. v., 8 C. & P. 558.....	266, 269
Charlesworth, R. v., 1 B. & S. 460.....	194, 198
Chase v. Boston, 180 Mass. 458.....	407
Chicago (B. of T.) v. Christie Grain and Stock, 198 U.S.R. 236.....	409
Clarke, R. v., 20 Can. Cr. Cas. 486.....	318
Clarke v. Bailie, 45 Can. S.C.R. 50.....	407
Clarke v. Saffery (1824), Ry. & Mood. 126.....	478
Clews v. Jamieson, 182 U.S.R. 461.....	410
Closson v. United States, 7 App. Cas. (D.C.) 460.....	294
Clouter & Heath, R. v., 8 Cox C.C. 227.....	245
Coal Mines Regulation Act, In re, 10 B.C.R. 408.....	131
Cockburn v. Kettle, 12 D.L.R. 512.....	327
Codd v. Cave (1876), 1 Ex. D. 352.....	386
Cohon, R. v., 6 Can. Cr. Cas. 393.....	112
Collins, R. v., 4 Can. Cr. Cas. 572.....	358
Commonwealth v. Costley, 118 Mass. 24.....	61
Comptroller of Patents (1899), 1 Q.B. 909.....	463
Cook, R. v., 23 Can. Cr. Cas. 50.....	87
Cook v. Hildreth (1891), 126 N.Y. 360.....	163
Cooper, R. v., 13 Cox C.C. 617, 46 L.J.M.C. 219.....	369, 375
Coulson, R. v., 1 Can. Cr. Cas. 114.....	380, 382
County Judge's Criminal Court, R. v., 23 Can. Cr. Cas. 7, 16 D.L.R. 500.....	285, 289
Courvosier, Reg. v., 9 C. & P. 362.....	57
Cox v. Hakes, 15 App. Cas. 506, 60 L.J.Q.B. 89.....	5, 6
Crandall, R. v., 27 O.R. 63.....	223
Crawford, R. v. (1912), 20 Can. Cr. Cas. 49, 5 A.L.R. 204, 6 D.L.R. 380.....	193
Creelman, R. v., 25 N.S.R. 404.....	174, 177
Criminal Code, Re, 16 Can. Cr. Cas. 549, 43 Can. S.C.R. 434.....	461, 462, 492

Crippen, Re (1911), 27 Times L.R. 258, 80 L.J.K.B. 290.....	180, 187, 485
Croteau, R. v., 9 L.C.R. 67.....	296, 302
Crowe, R. v., 4 C. & P. 251.....	202
Cruikshanks, R. v., 23 Can. Cr. Cas. 23, 16 D.L.R. 536	450, 454
Cunningham v. Tomey Homma, [1903] A.C. 151.....	
.....	114, 118, 120, 124, 133, 134, 135
Curry v. The King, 22 Can. Cr. Cas. 191, 48 Can. S.C.R. 532, 15 D.L.R. 347	334, 336, 337
Daley, Ex parte, 27 N.B.R. 129.....	33, 34
Daun, R. v., 11 Can. Cr. Cas. 244, 12 O.L.R. 227.....	1, 4
Davis, R. v., 22 Can. Cr. Cas. 187, 8 D.L.R. 1046, 4 O.W.N. 358....	169, 170
Davis, R. v. (1914), 19 B.C.R. 50, 22 Can. Cr. Cas. 431, 16 D.L.R. 149..	481
Delegal v. Highley (1837), B. & C. 950.....	332
Denault v. Robida, 8 Can. Cr. Cas. 501.....	235, 238
Denton v. Brown, 1 Keb. 698, 1 Sid. 186.....	388
Desborough v. Rawlins, 3 Myl. & Cr. 515, 40 E.R. 1025.....	445
Dibble v. The King (1908), 1 Cr. App. R. 155.....	485
Dick v. The King, 19 Can. Cr. Cas. 44.....	174, 177, 256
Doherty, Ex parte, 1 Can. Cr. Cas. 84	235, 238
Donahue v. Recorder's Court, 18 Can. Cr. Cas. 182.....	256
Doran, R. v. (1914), 10 Cr. App. R. 67.....	201
Dougall, R. v. (1874), 18 L.C.J. 85.....	200
Duff, R. v. (No. 2), 15 Can. Cr. Cas. 454.....	492
Duquette, R. v., 9 P.R. 29.....	48
Eberts v. The King, 20 Can. Cr. Cas. 273, 47 Can. S.C.R. 1.....	415, 419
Edgington v. Fitzmaurice, 29 Ch. D. 459.....	369, 377, 378
Ellis, R. v. (1910), 2 K.B. 746.....	358
Everest, R. v. (1909), 73 J.P. 269.....	339
Fancourt v. Heaven, 18 O.L.R. 492.....	327, 391, 393
Farrell, R. v., 15 Can. Cr. Cas. 100.....	450, 452
Fisher, R. v. (1909), 79 L.J.Q.B. 187, [1910] 1 K.B. 149.....	358, 483
Fontaine, R. v. (1914), 23 Can. Cr. Cas. 159	251
Fortier, R. v., 7 Can. Cr. Cas. 423.....	43, 45, 113
Foster v. Pearson, 1 C. M. & R. 849.....	402
Foulkes, R. v., 13 Can. Cr. Cas. 370, 17 Man. L.R. 613.....	13
Frank, R. v. (1910), 16 Can. Cr. Cas. 237, 21 O.L.R. 196.....	340
Fraser, R. v., 7 Cr. App. R. 99.....	38
Freeman, R. v., 21 N.S.R. 483.....	223
Frejd, R. v. (1910), 18 Can. Cr. Cas. 10, 22 O.L.R. 566.....	261
Fry, R. v., 19 Cox C.C. 135, 62 J.P. 457	450, 455
Gavin, R. v., 1 Can. Cr. Cas. 59.....	293, 294, 295
Gee, R. v., 5 Can. Cr. Cas. 148.....	349, 351
Geering, Reg. v. (1849), 18 L.J.M.C. 215.....	358
Giberson, Ex parte (No. 3), 18 Can. Cr. Cas. 355.....	256
Gilchrist v. Gardner, 12 N.S.W.L.R. 184.....	393
Giles, Reg. v., 10 Cox. C.C. 44.....	376, 377

Giles, Reg. v. (1894), 31 C.L.J. 33.....	112
Gilmore, R. v., 7 Can. Cr. Cas. 219, 6 O.L.R. 286.....	140, 141, 143
Giovanetti, R. v., 5 Can. Cr. Cas. 157, 34 N.S.R. 505.....	434, 435
Girvin R. v., 45 Can. S.C.R. 167.....	38
Gleenslade, R. v., 11 Cox C.C. 412.....	489, 496
Goddard v. Smith, 6 Mod. 262.....	391
Goldsberry, Ex parte, 10 Can. Cr. Cas. 392.....	243, 249
Goldsberry v. Bernatches, 10 Can. Cr. Cas. 392, 12 R. de J.....	243, 249
Gordon, R. v., 2 Can. Cr. Cas. 141, 6 B.C.R. 160.....	201
Goulet, R. v., 12 Can. Cr. Cas. 365.....	161
G.T.R. Co. v. Atty-Gen of Canada, [1907] A.C. 65.....	127
Green v. McLeod, 23 A.R. (Ont.) 676.....	509
Greenough v. Eccles, 5 C.B.N.S. 786.....	470, 473, 478, 480
Guerin, R. v. (1909), 14 Can. Cr. Cas. 424, 18 O.L.R. 425.....	477
Hall, R. v., 2 W. Bl. 1110.....	356
Harris, R. v., 13 Can. Cr. Cas. 393.....	380, 382
Harris, R. v., 18 Can. Cr. Cas. 392.....	240
Harris, R. v., 3 Burr. 1336.....	36, 37
Harrop v. Bayley, 6 El. & Bl. 218.....	161
Hayes, R. v., 6 Can. Cr. Cas. 357, 5 O.L.R. 198.....	265
Haynes v. Foster, 2 C. & M. 237.....	402
Hazen, R. v., 20 A.R. 633.....	28, 32, 174, 177
Hebert, R. v., 10 Can. Cr. Cas. 290.....	243
Heesom, R. v., 14 Cox C.C. 40.....	201
Helliwell, R. v., 30 O.L.R. 594.....	224, 225, 227
Henwood, R. v., 11 Cox C.C. 526, 22 L.T.R. 486.....	414, 421
Herman v. Jeuchner, 15 Q.B.D. 561.....	356
Hewitt v. Cane, 26 Ont. R. 133.....	391, 392
Hodder v. Williams, [1895] 2 Q.B. 663.....	383, 387
Hodge v. The Queen, 9 App. Cas. 117.....	130, 215
Hodges, R. v., 2 Lewin's C.C. 228.....	50, 51, 56, 61, 62
Hogue, R. v., 21 Que. K.B. 24.....	297, 305
Holden, R. v., 8 C. & P. 606.....	151, 152
Honan, R. v., 20 Can. Cr. Cas. 10, 6 D.L.R. 276, 26 O.L.R. 484.....	224, 225, 227
Hope, R. v., 17 Ont. R. 463.....	437, 443
Hopfe's Bail, Re, 22 Can. Cr. Cas. 116, 10 D.L.R. 216.....	297, 311
Hostetter, R. v., 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363.....	172, 173, 189, 190
How, Reg. v., 11 A. & E. 159.....	162, 165
Hughes, R. v., 4 Q.B.D. 614.....	389, 390, 391
Hung Gee, R. v., 21 Can. Cr. Cas. 404, 13 D.L.R. 44.....	325
Hunter, R. v., 3 C. & P. 591.....	202
Hurlburt, Reg. v., 27 N.S.R. 62.....	467
Ibrahim v. The King, [1914] A.C. 616, 63 L.J.P.C. 185.....	470, 472, 476, 481, 483
Irwing, R. v., 14 Can. Cr. Cas. 489.....	450, 456
Ivy, R. v., 24 U.C.C.P. 78.....	391, 392

Jamieson, Reg. v., 7 Ont. R. 153.....	45
Jeffries v. Alexander, 31 L.J. Ch. 14	169, 171
Johnson, R. v. (1847), 2 C. & R. 354.....	194, 202
Johnson, R. v. (1901), 4 Can. Cr. Cas. 178.....	211
Jones, R. v. (1806), 8 East 31	200, 202
Jones v. Shervington, [1908] 2 K.B. 545	318, 322
Jung Lee, R. v., 22 Can. Cr. Cas. 63, 13 D.L.R. 896, 5 O.W.N. 80.....	325
Justices of Queen's County, R. v. (1882), 19 L.R. Ir. 294.....	184
Justices of West Riding, R. v., 7 A. & E. 583.....	185
Keefe v. McLennan, 11 N.S.R. 5	214
Keefer, R. v., 5 Can. Cr. Cas. 132	243, 245
Keeler, R. v. (1877), 7 P.R. (Ont.) 117.....	266, 269
Kempt, In re, 16 Wis. 379	294
Komiensky, R. v., 6 Can. Cr. Cas. 528.....	7, 12, 13, 14
Krafchenko, R. v., 22 Can. Cr. Cas. 277, 17 D.L.R. 244.....	365, 368
Labouchere, R. v., 12 Q.B.D. 320, 15 Cox C.C. 415.....	424, 433, 434
Lai Ping, R. v., 8 Can. Cr. Cas. 467, 11 B.C.R. 102.....	334, 335, 337
Lake v. Butler, 24 L.J.Q.B. 273.....	345
Lapointe, R. v., 20 Can. Cr. Cas. 98, 4 D.L.R. 210.....	450, 455
Launock v. Brown (1819), 2 B. & Ald. 593, 106 E.R. 482.....	387
Lawler v. Edmonton (unreported)	274
Lawrence, R. v. (1866), 4 F. & F. 901.....	202
Leach, R. v., [1912] 1 K.B. 488.....	71
Lee, R. v., 4 Can. Cr. Cas. 416	23
Lee Guey, R. v. (1907), 15 O.L.R. 235.....	147
Leigh v. Hind, 9 B. & C. 774, 7 L.J.K.B. 313.....	345, 346
Lepine, R. v., 4 Can. Cr. Cas. 145	236, 241
Lewis, R. v., 6 Can. Cr. Cas. 499.....	449, 451
Lewis, R. v., 78 L.J.K.B. 722.....	194, 198
Lewis v. Harris (1913), 30 Times L.R. 109.....	339
Long, Ex parte, 102, L.T.R. 325.....	466
Lord Audley's Case, 1 St. Tr. 303.....	71
Lowery, R. v. (1908), 13 Can. Cr. Cas. 105, 15 O.L.R. 182.....	259, 261
Lynn, R. v. (No. 1), 17 Can. Cr. Cas. 354, 3 S.L.R. 339.....	35, 37
Macarthy, R. v., Carr & M. 625.....	201
Madden v. Nelson, [1899] A.C. 626.....	488
Mahoney v. Leschinski, 19 Can. Cr. Cas. 169, 1 D.L.R. 535.....	23
Makin v. Atty.-Gen. for N.S.W., [1894] A.C. 57.....	358, 360, 447, 476
Manners, R. v., 7 C. & P. 801.....	61
Martin v. Mackonachie (1878), 3 Q.B.D. 730.....	28, 30
McArthur's Bail, Re, 3 Can. Cr. Cas. 195.....	177
McCann v. Preveneau, 10 Ont. R. 573.....	391
McCormack, R. v., 17 Ir. C.L.R. 411.....	356
McCraw v. The King, 13 Can. Cr. Cas. 337.....	201
McDonald, R. v., 6 Can. Cr. Cas. 1	211
McDonald, R. v., 8 Can. Cr. Cas. 348.....	235, 238

McDonald, R. v. (1913), 21 Can. Cr. Cas. 229.....	463
McDougall, R. v., 8 Can. Cr. Cas. 234.....	243, 247
McGregor v. Whalen, 31 O.L.R. 554.....	318, 322
McGregor, R. v., 2 Can. Cr. Cas. 410.....	450, 454
McIntosh v. The Queen, 23 Can. S.C.R. 180, 5 Can. Cr. Cas. 254.....	197
McLeod, R. v., 30 N.S.R. 471.....	223
McNutt, R. v., 4 Can. Cr. Cas. 392.....	161
McNutt, Re, 21 Can. Cr. Cas. 157, 47 Can. S.C.R. 259, 10 D.L.R. 834, 49 C.L.J. 117.....	114, 128, 211, 213, 223
Mercier, R. v., 13 Can. Cr. Cas. 475.....	136, 137
Milligan, Ex parte, 105 U.S. 696.....	294
Minchin, R. v., 22 Can. Cr. Cas. 254, 7 A.L.R. 148, 15 D.L.R. 792.....	414, 415
Montgomery, R. v., 102 L.T. 325.....	235, 238, 463, 464, 465, 466
Morgan R. v., 2 B.C.R. 329.....	201
Morrison, Thompson Hardware Co. v. Westbank Trading Co., 16 B.C.R. 33.....	6
Morse, R. v., 22 N.S.R. 298.....	256
Mortimer v. Fisher, 11 D.L.R. 77.....	327, 391, 393
Morton, R. v. (unreported).....	190
Moufflet v. Cole, 42 L.J. Ex. 8.....	345
Mount, R. v., L.R. 6 P.C. 304.....	294
Mullady, R. v. (1868), 4 P.R. (Ont.) 314.....	266, 269
Mulligan v. Thompson, 23 O.R. 54.....	72
Mulvihill, R. v., 22 Can. Cr. Cas. 354, 18 D.L.R. 189, 19 B.C.R. 197..	194, 195, 470, 478
Murray, R. v., 1 Can. Cr. Cas. 452.....	243, 249
Nelson, R. v., 15 Can. Cr. Cas. 10, 18 O.L.R. 484.....	259, 260, 261
Nobbett v. Hopkinson, [1905] 2 K.B. 214.....	318, 323
Norfolk, R. v., 99 L.T. 936.....	341, 347
Nunn, Re, 2 Can. Cr. Cas. 429.....	236, 241
Oberlander, R. v., 16 Can. Cr. Cas. 244, 15 B.C.R. 134.....	467
O'Cain, In re, 13 R.L. 275.....	249
Ollis, Reg. v., [1900] 2 Q.B. 758.....	358
Palmer, R. v., 6 C. & P. 652.....	201
Patteson, R. v., 36 U.C.Q.B. 129.....	140, 145
Paul, R. v., 20 Can. Cr. Cas. 159, 7 D.L.R. 24.....	389, 390
Payne, R. v., L.R. 1 C.C.R. 349.....	489, 494
Pearce v. Street, 3 B. & Ad. 397.....	327
Pearks v. Richardson, [1902] 1 K.B. 91.....	389, 390
Pearson v. Carpenter, 35 Can. S.C.R. 380.....	409
Pembridge, Reg. v., 3 Q.B. 901.....	18
Perrin, R. v., 16 O.R. 446.....	454
Perry, R. v., Ry. & Mov. N.P.C. 353.....	70
People ex rel. Cook v. Hildreth (1891), 126 N.Y. 360.....	163
People ex rel. Springsted v. Cobleskill (1892), 20 N.Y. Supp. 920.....	163
Phillips v. Martin (1890), 15 A.C. 193.....	33, 35
Pickard, R. v., 21 Can. Cr. Cas. 250, 11 D.L.R. 423.....	467

Plante, <i>Ex parte</i> , 6 L.C. Rep. 106.....	249
Plante v. Cliche, 17 Can. Cr. Cas. 43, 38 Que. S.C. 542.....	256
Pletts v. Beattie, [1896] 1 Q.B. 519.....	318, 324
Police Commrs. v. Cartman, [1896] 1 Q.B. 655.....	349, 351
Pollard, R. v., 15 Can. Cr. Cas. 105.....	358
Pollman, R. v., 2 Camp. 229.....	228, 231
Ponton v. Brown, 1 Sid. 181.....	387
Porter, R. v., [1910] 1 K.B. 369.....	356
Price v. Manning, 42 Ch. D. 372, 58 L.J. Ch. 649.....	470, 478, 485
Proctor v. Parker, 3 Can. Cr. Cas. 37.....	235, 238
Queen's County, R. v., 19 L.R. Ir. 294.....	184
Quinn, R. v., 2 Can. Cr. Cas. 153.....	256
Quong Wing, R. v., 21 Can. Cr. Cas. 326, 12 D.L.R. 656, 49 C.L.J. 593.....	114
Raffenberg, 15 Can. Cr. Cas. 297.....	23
Ravenga v. Macintosh, 2 B. & C. 693.....	327, 332
Reeve v. Wood (1864), 10 Cox C.C. 58, 5 B. & S. 364, 34 L.J.M.C. 15.....	70, 71
Reigate v. Sutton, 99 L.T.R. 168.....	346
Rice v. Howard, 16 Q.B.D. 681, 55 L.J.Q.B. 311.....	470, 471, 478, 479, 485
Richardson v. Beamish, 21 Can. Cr. Cas. 487, 13 D.L.R. 400, 23 Man. L.R. 306.....	394, 395
Ricken v. York, [1908] A.C. 454.....	223
Robinson, Re, 23 L.J.Q.B. 286.....	356
Robinson, R. v., 12 Can. Cr. Cas. 447, 14 O.L.R. 519.....	209, 210
Robinson, R. v. (1907), 14 O.L.R. 519.....	204, 208
Robinson v. Mollett, L.R. 7 H.L. 802.....	407, 408
Robinson v. Morris, 23 Can. Cr. Cas. 209, 19 O.L.R. 633.....	203, 204, 205, 208
Rogers, R. v., 7 Mod. 29.....	180, 188
Rymal, R. v., 17 Ont. R. 227.....	437, 443
Saffron Walden, Reg. v., 15 L.J.M.C. 115.....	345, 346
St. Clair, R. v., 3 Can. Cr. Cas. 551.....	136, 137
St. Denis, R. v., 8 P.R. (Ont.) 16.....	249
St. Pierre, R. v., 19 Can. Cr. Cas. 82.....	38
Sarault, R. v., 9 Can. Cr. Cas. 448.....	236, 241
Saunders, R. v., 2 Cox. C.C. 249.....	356
Savage, R. v., 1 C. & K. 75.....	201
Scaife, R. v., 10 L.J.M.C. 144.....	356
Schmidt, R. v., 35 L.J.M.C. 94.....	362, 364
Schram, Reg. v., 2 U.C.Q.B. 91.....	177
Sell, R. v., 9 C. & P. 348.....	245
Semayne's Case, Re, 5 Coke 91.....	386
Serjeant, R. v., R. & M.N.P.C. 354.....	70
Sinclair v. Haynes, 16 U.C.R. 247.....	393
Skinner, R. v., 9 Can. Cr. Cas. 558.....	380
Slack, Reg. v., L.R. 7 Q.B. 408.....	421
Slavin, R. v., 17 U.C.C.P. 205.....	194, 198, 201

Smith, R. v., 3 Can. Cr. Cas. 467	223
Smith, R. v. (1905), 9 Can. Cr. Cas. 338	147
Smith, R. v. 16 Can. Cr. Cas. 432	256
Smith (William), R. v., 2 Cr. App. R. 86	470, 476
Smith v. Moody, [1903] 1 K.B. 56, 20 Cox. C.C. 369	382
Solomon v. Bitton, 8 Q.B.D. 176	33, 35
Somers, R. v., 1 Can. Cr. Cas. 46	223
Sonyer, R. v. (1898), 2 Can. Cr. Cas. 501	481
Sovereign, R. v., 20 Can. Cr. Cas. 103, 4 D.L.R. 356, 26 O.L.R. 16	7, 10, 11, 18, 20, 285, 289
Springsted v. Cobleskill (1892), 20 N.Y. Supp. 920	163
Sproule, Re, 12 Can. S.C.R. 140	243, 244, 249
State v. Overson, 8 A. & E. Annotated Cas. 796	61
Steel, R. v., 26 O.R. 540	223
Stewart, R. v., 15 Can. Cr. Cas. 331	88, 243, 247
Stokes v. Grissell, 23 L.J.C.P. 141	346
Stroner, R. v., 1 C. & K. 650	151, 152
Surrey, R. v., 6 Q.B.D. 100	341, 347
Sutherland, R. v. (1911), 2 O.W.N. 595	28, 32
Sutton v. Johnson, 1 T.R. 493	331
Sweeney v. Spooner, 3 B. & S. 330	71
Talbot's Bail, Re, 23 O.R. 65	177
Taylor, R. v., 12 Can. Cr. Cas. 244	209, 210
Taylor, R. v. (1882), 15 Cox C.C. 8	201
Taylor v. Wilson, 28 Times L.R. 97	186
Tennant v. Union Bank of Canada, [1894] A.C. 31	127
Tetreault, R. v., 17 Can. Cr. Cas. 259	247
Thompson, R. v., 14 Can. Cr. Cas. 27, 17 Man. L.R. 608	7, 13, 14, 21, 22, 285, 289, 291
Thompson, R. v., [1909] 2 K.B. 614, 100 L.T.R. 970	235, 238, 463, 465
Traynor, R. v., 4 Can. Cr. Cas. 410	236, 241
Trottier, R. v., 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 25 W.L.R. 663	255
Trueman, R. v., 29 Times L.R. 599	184
Union Colliery Co. v. Bryden, [1899] A.C. 580	114, 117, 118, 119, 120, 121, 123, 128, 130, 132, 133, 134, 135
United States v. Curtis, 4 Mason 238	10, 17
Upton v. Brown, 21 Can. Cr. Cas. 190	160, 161
Vaughan, R.v., 4 Burr. 2494	228, 231
Wagner, R. v., 6 Can. Cr. Cas. 113	437, 443
Wah Kie v. Cuddy, 23 Can. Cr. Cas. 325	383
Wakefield, R. v., 2 Lewin C.C. 1, 279, 2 R.C. & M. 605	70
Wakelyn, R. v., 21 Can. Cr. Cas. 111, 10 D.L.R. 455	1, 4, 38
Wandsworth Board of Works v. United Telephone Co., 13 Q.B.D. 904 ..	126
Wener, R. v., 6 Can. Cr. Cas. 406	7, 12, 16
West, R. v., 4 Burr. 2507	36, 37

West Riding (J.J. of), R. v., 7 A. & E. 583.....	185
Whelan, R. v., 4 Can. Cr. Cas. 277	23
Whitaker, R. v. (1894), 24 O.R. 437.....	162, 166
White, Reg. v., 4 F. & F. 383.....	60, 365, 368
Wilcox v. Gotfrey, 26 L.T.N.S. 481.....	496, 509
Wilson, R. v., 21 Can. Cr. Cas. 105.....	358
Winkel, R. v. (1911), 76 J.P. 191.....	339
Winsor v. The Queen, L.R. 1 Q.B. 390.....	194, 198, 489, 494
Wood v. Newby, 21 W.L.R. 438.....	394
Woodlock v. Dickie, 6 R. & G. 86.....	468
Woods v. Dennett, 2 Starkie 89.....	345
Wright v. Wilcox (1850), 19 L.J.C.P. 333.....	485
Wyatt, R. v., [1904] 2 K.B. 389	358
 Ying Foy, Re, 15 Can. Cr. Cas. 14, 14 B.C.R. 254.....	200
Young, R. v., 4 Can. Cr. Cas. 580.....	180, 186
Young, R. v., 5 O.R. 184 (a).....	265
 Zackman, R. v. (unreported)	190
Zyla, R. v., 17 W.L.R. 258	173, 189, 190

CORRIGENDA.

Page 67, vol. 23, line 4 from end, for "1913," read "1914."

" 80, insert date of decision, July 6, 1914.

" 90, for "article 239," read "article 229."

" 92, for "article 239," read "article 229."

" 146, head note 1, line 3, add after "the right" the words "in Ontario."

" 159, four lines from bottom, for "1002," read "1003."

" 474, vol. 22, line 27, for "Doherty," read "Dougherty,"

" 474, vol. 22, line 28, for "N.B.R.," read "U.C.R."

Canadian Criminal Cases.

**Reports of Cases in Criminal and Quasi-Criminal matters
decided in the Courts of Canada and of the Provinces
thereof.**

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE HAULTAIN, C.J., NEWLANDS, AND LAMONT, JJ.

REX v. SCHELLER.

1. **WITNESSES (§ III—58)—CORROBORATION—CHARGE OF FORGERY—CR.
CODE 1906, SEC. 1002.**

The corroboration required by sec. 1002 of the Cr. Code 1906; on a charge of forgery, is additional evidence that will fortify and strengthen the credibility of the main witness and justify the evidence being accepted and acted upon if it is believed and is otherwise sufficient.

[*R. v. Daun*, 11 Can. Cr. Cas. 244, 12 O.L.R. 227; and *R. v. Wakelyn*, 21 Can. Cr. Cas. 111, 10 D.L.R. 455, referred to.]

DECIDED: March 16, 1914.

CROWN case reserved on a charge of forgery.

T. A. Colclough, K.C., for the Crown.

H. V. Bigelow, K.C., for the accused.

HAULTAIN, C.J., concurred in answering the question in the affirmative and affirming the conviction.

NEWLANDS, J.:—This was a prosecution for forgery, and the question reserved for the opinion of this Court by the trial Judge is: Was there sufficient corroboration as required by sec. 1002 of the Criminal Code?

The evidence of forgery was that the accused had four promissory notes given to him by one Ralph Jonat which he discounted in the Union Bank of Canada at Yorkton. While these

notes were in the bank he agreed to sell them to R. F. Pachal. He then got copies of the notes from the bank on which it was proved he endorsed his own name and the name of his brother with his brother's consent. Upon these copies, when handed over to Pachal, was the name of Ralph Jonat as maker. Jonat swore that he never signed same. This evidence would, in my opinion, be sufficient to raise the presumption that the accused forged the name of Jonat to these notes before handing the same to Pachal and would be sufficient evidence on which a jury could convict him if it were not for section 1002 of the Criminal Code, which provides:—

No person accused of any offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused; . . . (e) Forgery.

The above evidence, although given by more than one witness, does not fulfil the requirements of this section because it is all needed to prove the offence, and one part of it cannot be considered as corroborative of the other.

The only evidence given at the trial which could be considered corroborative evidence implicating the accused, leaving out of consideration the comparison of handwriting, was the evidence of Schram, the accountant, and Roberts, the manager, of the Union Bank of Canada at Yorkton, that the originals of the three alleged forged notes were at the time in the possession of the Union Bank as collateral security.

I am of the opinion that the fact that at the time the accused sold these notes, which are alleged to have been forged, to Pachal, the originals of them were in the Union Bank at Yorkton, where they had been placed by him as collateral security for a loan, is most material evidence implicating him, and as the two bank officials corroborate each other upon this point, we have what the statute requires, corroborative evidence of a material particular implicating the accused. I think the question submitted should be answered in the affirmative.

LAMONT, J.:—In this case the accused was charged with having forged the name of Ralph Jonat to certain promissory

notes. On behalf of the Crown, evidence was put in shewing that in 1911 Ralph Jonat had purchased a farm from the accused under an agreement of sale, and that subsequently, in January, 1912, he took up the agreement and gave the accused four promissory notes for the amount remaining unpaid, which was something over \$3,000. The accused took these notes, or three of them, to the Union Bank at Yorkton, and there pledged them as security for an advance. In February, 1913, the accused being in need of money arranged with one R. F. Pachal for the sale to him of the notes. When he went to the bank for the notes the bank refused to let him have them unless he paid up his indebtedness. He then asked the bank for a copy of the notes. The accountant made copies of the three notes in the bank, excepting that he did not copy the signatures thereto, and he gave these copies to the accused. The accused took them to Pachal, and when he handed them over they had thereon the name of Ralph Jonat as maker and the names of the accused and his brother as endorsers. Pachal bought the notes. Ralph Jonat swore that his name on the notes was not signed by him or with his authority. Both the original notes signed by Jonat and the copies thereof sold to Pachal were put in evidence. For the defence, the accused swore that, after he got the copies, he saw Jonat on the street and took him into his office, and that Jonat there signed his name to the notes. He says he then endorsed his own name thereon and that of his brother with his brother's consent, and turned the notes over to Pachal. The jury found the accused guilty; and the learned trial Judge reserved for the opinion of this Court the following question: "Was there sufficient corroboration as required by section 1002 of the Code?"

Section 1002 provides that no person accused of any of the offences therein set forth, of which forgery is one, shall be convicted on the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused. The evidence of Jonat denying his signature to the Pachal notes therefore requires corroboration. The corroboration necessary to satisfy the requirements of the stat-

ute is stated by the Court of Appeal of Ontario in *The King v. Daun*, 11 Can. Cr. Cas. 244 at 249, 12 O.L.R. 227, as follows:—

What is required is corroboration in some material respect that will fortify and strengthen the credibility of the main witness and justify the evidence being accepted and acted upon if it is believed and is sufficient. The corroboration required is not unlike that required in the case of accomplices. On this point Wightman, J., says, in *The Queen v. Boyes* (1861), 1 B. & S. 311 at 320: "It is not necessary that there should be corroborative evidence as to the very fact; it is enough that there shall be such as shall confirm the jury in the belief that the accomplice is speaking the truth.

The accused gave evidence on his own behalf and his evidence may be looked at for corroboration: *R. v. Wakelyn*, 10 D.L.R. 455, 21 Can. Cr. Cas. 111. That evidence shews that the accused obtained copies of the notes Ralph Jonat had given him from the accountant at the bank, and that these copies were in his possession until he turned them over to Pachal with Jonat's name thereon. This eliminates any question of Jonat's signature having been forged by any person other than the accused. If Jonat did not sign the notes, the accused must have signed Jonat's name or procured it to be signed, as he was the only person who had possession of the notes.

The accused, in his evidence, further admits that when he sold the notes to Pachal he had the notes Jonat had given him for the farm in the bank, that he was unable to lift them, and that he needed money. He also admits that later on, when Jonat found out that there were two sets of notes with his name thereon and came to see him about them, he told Jonat that the Pachal notes were only copies from the bank. I am of opinion the accused's statement to Jonat that the Pachal notes were only copies is corroboration of Jonat's evidence that he did not sign them. Why should the accused say they were only copies if they bore the real signature of Jonat? To my mind this was an admission by the accused that the notes were not genuine as far as Jonat was concerned, which would support Jonat's statement that he had never signed them. There was, therefore, sufficient corroborative evidence to satisfy the statute.

Conviction affirmed..

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE MORRISON, J.

Re BHAGWAN SINGH.

1. HABEAS CORPUS (§ I B—7)—APPLICANT OUT ON BAIL—NON-DISCLOSURE.

The essential and leading theory of *habeas corpus* procedure is the immediate determination of the right to the applicant's freedom; and when a *habeas corpus* is obtained without disclosing so material a fact as that the applicant was not in custody at the time of the application, as he had been released on bail, it will be set aside.

[*Cox v. Hakes*, 15 App. Cas. 506, referred to.]

DECIDED: January 20, 1914.

MOTION to compel an immigration official to make a return to a writ of habeas corpus.

The application was refused and the order for the issue of the writ was set aside.

J. E. Bird, for Bhagwan Singh, applicant.

W. B. A. Ritchie, K.C., for Inspector Reid of the Dominion Immigration service, respondent.

MORRISON, J.:—On October 7 last, upon the application *ex parte* of Bhagwan Singh, a writ of *habeas corpus* was ordered to be issued to Malcolm R. J. Reid, Dominion Government Immigration Superintendent and Inspector for the Port of Vancouver, B.C., directing him to have before a Judge of this Court, presiding at Chambers at Vancouver, forthwith on receipt of the said writ, the body of the said Bhagwan Singh, alleged to be detained in the custody of the said Reid. At the time this application was made Bhagwan Singh was not in custody, having been released on sufficient bail. This fact was not disclosed in the material read in support of the application nor by Mr. Steers, who then appeared for the applicant. This order lay dormant until November 19 following. Bhagwan Singh in the meantime changed his solicitors. On November 19 the writ was issued but not served on Reid, but by means of wireless message the fact of its issuance appears to have been communicated to him whilst en route to Victoria.

After arrival in Victoria, whence Bhagwan Singh was taken for

deportation to Hong Kong, pursuant to the provisions of the Immigration Act, Mr. Reid applied for and obtained an order for another writ of *habeas corpus* from my brother Murphy there. This writ was issued and duly served. Notwithstanding all this, Bhagwan Singh was deported, and is now without the jurisdiction.

Application is now made to me upon motion served upon Mr. Reid requiring him to produce Bhagwan Singh "before the Court on Monday the 5th of January, 1914, and to make a return of the writ issued on the 19th of November, 1913." This notice is dated December 1, 1913. On December 4, another notice of a similar character, dated December 4, was filed and in due course served on Mr. Reid requiring him to appear on January 9, 1914.

From the material filed and submitted I am of opinion that the order of October 7 was obtained by the suppression or omission of a material fact, viz., that Bhagwan Singh was not in custody at that time.

"The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom": Halsbury, L.C., in *Cox v. Hakes*, 15 App. Cas. 506, 517, 60 L.J.Q.B. 89; *Barnardo v. Ford*, [1892] A.C. 326, 335, 61 L.J.Q.B. 728.

Then as to the subsequent course of the matter, I think the applicant has prejudiced his right to a return: *per* Lord Watson in *Barnardo v. Ford*, *supra*. As to the right to reverse an order obtained *ex parte*, see Hunter, C.J., in *Morrison, Thompson Hardware Co. v. Westbank Trading Co.*, 16 B.C.R. 33. The incident referred to in the material filed, that I was interrupted in my sittings at the Vancouver Criminal Assizes by a solicitor on the applicant's behalf for the purpose of instructing the registrar to forward a message to Mr. Reid that the writ had been issued, cannot, I submit, in any way be taken as a confirmation of my previous order. I merely told the registrar that if a writ had, in fact, been issued, I saw no reason why he should not state that fact in a telegram to whomsoever might be interested in that occurrence.

Considerable stress was laid in the affidavits filed on behalf of Bhagwan Singh upon the alleged contumely displayed by Mr. Reid when told of the proceedings leading to the issue of the writ, and which allegations are denied by him. As to that phase of this matter, all I have to say is that Mr. Reid is a responsible

officer of a great department of government, and doubtless the Minister in charge of that department will take proper cognizance of the incident if founded on facts. Under all the circumstances I do not think I am called upon to display any undue sensitiveness concerning it. The dignity of the Court in such cases usually takes care of itself. The order of October 7, 1913, upon which is based the writ of November 19, 1913, is therefore set aside.

Order set aside.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE SIR CHARLES TOWNSEND, C.J., GRAHAM, E.J., LONGLEY,
DRYSDALE, AND RITCHIE, JJ.

REX v. COUNTY JUDGE'S CRIMINAL COURT.

Re WALSH.

1. CRIMINAL LAW (§ II A—49)—SPEEDY TRIAL PROCEDURE—ELECTING TRIAL WITHOUT JURY—EFFECT OF INDICTMENT.

A person sent up for trial for an indictable offence within the scope of the speedy trials clauses of the Criminal Code and against whom, while out on bail allowed by the magistrate, a true bill is found by the grand jury on the same charge, is entitled, on being taken into custody under a bench warrant in respect of such indictment, to the benefit of the speedy trials clauses and to elect thereunder for trial without a jury before the county court judge's criminal court if he has not pleaded to the indictment; and a mandamus will lie to the latter court to enforce such right where the county judge before whom the prisoner was brought had ruled that he had no jurisdiction because of the indictment to permit the accused to elect for trial without a jury.

[*R. v. Sovereign*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356, distinguished; *R. v. Wener*, 6 Can. Cr. Cas. 406; and *R. v. Komiensky*, 6 Can. Cr. Cas. 528, discussed; *R. v. Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, approved.]

DECIDED: March 14, 1914.

MOTION for a writ of mandamus, or for an order in the nature of a mandamus, to the County Court Judge's Criminal Court of Halifax, to proceed on the criminal charge against the relator Daniel Walsh, so as to permit of his election of speedy trial under sec. 827 of the Criminal Code 1906, as amended in 1909.

A mandamus was ordered.

On June 16, 1913, the relator was sent up for trial by the stipendiary magistrate of the city of Halifax on a charge of indecent assault. At the October sittings, 1913, of the Court, sitting for the disposal of criminal business, the relator was indicted by the grand jury for the county of Halifax for said offence, and not being then in the county a bench warrant was issued for his arrest. On March 3, 1914, the relator was arrested by the sheriff of the county of Halifax on said bench warrant, who thereupon notified the Judge of the County Court Judge's Criminal Court under sec. 826 of the Criminal Code that the relator was then in custody under said warrant, and the relator was thereupon brought before said Judge and by his counsel expressed his wish to be tried before said Judge on said charge, but the said Judge declined to allow the relator to elect to be tried before him on the ground that he had no jurisdiction to try the relator for said offence, and recommitted him under said bench warrant to the county jail of the county of Halifax.

The Court, sitting *in banco*, was now moved on behalf of the relator for a writ of mandamus, or alternatively, for an order in the nature of a mandamus under Crown rule 70, commanding the Judge of the County Court Judge's Criminal Court at Halifax or said Court upon the relator being brought before him to proceed under sec. 827 (a) and (b) of the Criminal Code 1906, by stating to the relator the offence with which he was charged and that he had the option to be forthwith tried before said Judge without the intervention of a jury, and the relator consenting thereto, to proceed according to law to try the relator for the offence charged.

J. J. Power, K.C., for the relator.

A. G. Morrison, K.C., for the Attorney-General of Nova Scotia.

SIR CHARLES TOWNSHEND, C.J.:—This is an application for a writ of mandamus under Crown rule 70, commanding the Judge of the County Court Judge's Criminal Court to proceed as regards Daniel Walsh under secs. 827 (a) and (b) for the offence with which he is charged.

The facts are, briefly, that the accused was sent up for trial by the stipendiary magistrate of the city of Halifax for indecently assaulting one Pearl Connors in March, 1913, and was admitted to bail. At the October sittings of the Supreme Court for criminal trials the accused was indicted by the grand jury for the offence. A bench warrant was issued under which he was arrested, and committed to the common jail. The sheriff duly notified the Judge and the accused was brought before him, and expressed his wish to elect to be tried before him on the charge contained in the indictment, but the Judge declined to let him elect on the ground that he had no jurisdiction to try him.

The reason, as I understand, of the learned Judge below was that after an indictment found on the charge, it was not competent for the prisoner to elect to be tried before him. All proceedings in reference to the trial of criminal offences before the County Court Judge are prescribed in secs. 825, 826, 827 and 828 of the Criminal Code as amended by ch. 9 Acts of 1909.

I have had some difficulty in arriving at the same conclusion as my brethren in this matter; in fact, I have even still some doubt. I, however, concur in the result, as I am unable to give any meaning to the language used in sec. 825, sub-sec. 4, "*or who is otherwise in custody awaiting trial on the charge shall be deemed committed for trial within the meaning of this section,*" if it does not cover the case of the accused here.

He is in custody awaiting trial on the charge in the indictment. He has, therefore, the right of election, unless the fact that he has been arrested under a bench warrant founded on this indictment makes a difference, and I was at first inclined to think it did. On further consideration, however, I incline to the view that the words already cited must apply to even this case of a man so indicted, and in custody awaiting trial, literally speaking there can be no doubt they do. I am further led to this view by sec. 828 (sub-sec. 2) giving a prisoner the right of re-election (which is not this case) where the words used are "at any time before such trial has commenced, and whether an indictment has been preferred against him or not."

The word "trial" which is here used I think in the sense of the trial before the jury after it has been commenced, and the word "preferred" must be understood in the sense of found, as no trial in the Supreme Court could be commenced before a jury until indictment found. *Vide United States v. Curtis*, 4 Mason 238. It seems reasonable to infer from this that if he can re-elect after indictment found, he should have, and must have, the same right when he has made no election at all.

I should have felt disposed to follow the case of *Rex v. Sovereign*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356, in which the Court of Appeal of Ontario decided the other way, but the facts and position of the accused are not the same, but I agree with what all the Judges in that case said except that they do not appear to have considered sec. 825, sub-sec. 4, or, possibly, it was not brought to their attention. However that may be, I have not been able to discover any other meaning than that contended for by counsel for the prisoner.

The writ of mandamus must go to the County Court Judge.

GRAHAM, E.J.:—This is an application for a mandamus to require the County Court Judge to hold a Court to give the relator an opportunity to consent to a trial before him under the speedy trials provisions of the Criminal Code.

By section 825 of the Criminal Code [as amended by ch. 9 of the Acts of 1909] it is provided:—

Every person committed to gaol for trial on a charge of being guilty of any of the offences which are mentioned in section 582 . . . may, with his own consent be tried in any province of Canada and if convicted, sentenced by the Judge.

(3) Such trial shall be had, under and according to the provisions of this Part out of sessions and out of the regular term or sittings of the Court, and whether the Court, before which, but for such consent, the said person would be *triable for the offence charged or the grand jury thereof is, or is not then in session*.

(4) A person, who has been bound over by a justice, or justices, under the provisions of section 696, and has been surrendered by his sureties and is in custody on the charge, or who is otherwise in custody awaiting trial on the charge, shall be deemed to be *committed for trial* within the meaning of the section.

(5) Where an offence charged is punishable with imprisonment for a period exceeding five years, the Attorney-General may require that the charge be tried by a jury and may so require, notwithstanding that the

person charged has consented to be tried by the Judge under this Part and thereupon the Judge shall have no jurisdiction to try or sentence the accused under this Part.

Section 828, sub-section 2 is as follows:—

Any person who has elected to be tried by a jury may, notwithstanding such election, at any time before such trial has commenced and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and Judge, etc., to proceed. . . . Provided that if an indictment has been preferred against the person, the consent of the prosecuting officer shall be necessary to a re-election.

In this case, the relator, after a preliminary investigation on a charge of indecently assaulting a female, was bound over by a justice under section 626, that is to say, he was not committed for trial, but bound over to appear for trial. He was bailed, he was not surrendered by his sureties but an indictment was preferred against him before the grand jury and a bench warrant was issued by a Judge for his arrest as he had not appeared on his recognizance, and he is in custody awaiting trial on the charge laid against him, not a different charge. The case is, I think, clearly within the terms of sub-section 4. I think there is no difference in effect between the case of sureties rendering a defendant under a warrant (sec. 703) and the case of an arrest under a bench warrant. One is kindred to the other, and the words "or otherwise" ought to be held to cover this case.

The legislature contemplated a detention on some kind of fresh proceeds upon the original charge. There is no magic about a bench warrant, it does not make the charge a different one nor does an indictment for the same charge. A justice of the peace may issue a bench warrant.

The only question is whether, after an indictment returned, a prisoner may elect to be tried without a jury. The counsel for the Judge relies upon *Rex v. Sovereign*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356, 26 O.L.R. 16, and, of course, I would follow such a decision if it was in point. But there the original charge and proceedings on the prosecution before the justice had been abandoned, the indictment was not preferred at the instance of the person bound over to prosecute; the Crown proceeded by

indictment on another charge by the consent of the Judge under section 873 of the Code. Therefore, the defendant was not awaiting his trial on the original "charge," and the section 825, sub-section 4, did not apply to that case, and was not referred to by the learned Judges in their opinions.

Maclaren, J., 4 D.L.R. 357, 20 Can. Cr. Cas. 108, says:—

It is true that there was in this case a preliminary examination before a magistrate and the prisoner was committed for trial.

(That of itself displaced the application of sub-section 4 which applies to a case in which the defendant was not committed but only held to bail). He continues:—

But this was not followed up by an indictment based upon the charge for which he was committed, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice as might have been done under the provisions of section 871 of the Criminal Code. . . . The fact is, that the depositions and the committal were both ignored and were not followed by the person bound over to prosecute, if there was such a person, or by the County Crown Attorney. Instead of this, the County Crown Attorney, under section 873, obtained the written consent of the Judge to prefer the indictment set out in the reserved case on which a true bill was returned by the grand jury and on which the petty jury returned a verdict of guilty. . . . In the circumstances we must, I think, assume that the charge in the indictment is not the same as that for which the prisoner was committed, or any other charge appearing in the evidence before the magistrate as in either of these events the County Crown Attorney would not, under section 871, have needed the consent of the Judge to prefer the indictment.

Then he cites a passage from Wurtele, J., in *The King v. Wener*, 6 Can. Cr. Cas. 406, and proceeds:—

As stated above, the indictment in this case did not originate with, and is not based upon a charge or depositions taken before a magistrate, but is based solely upon the written consent given by the trial Judge and the Code does not provide for a trial before a Judge without a jury in such a case.

Then follows an obiter dictum:—

But even if the indictment had been based upon a charge for which the accused had been committed or which appeared in the depositions, I am of opinion that he should have elected before the true bill was found by the grand jury.

Later he quotes from Wurtele, J., in *The King v. Wener*, 6 Can. Cr. Cas. 406, and *The King v. Komienksy*, 6 Can. Cr. Cas. 528, in support of this view.

This appears also to have been the opinion of Moss, C.J.O. As to the other Judges, Garrow, J.A., and Latchford, J., concurred in the opinion generally not necessarily supporting the dictum, and Magee, J.A., dissented on this point.

It is upon this view, namely, that on an indictment returned, though not pleaded to, the prisoner's right to exercise his option to be tried without a jury, is cut off.

Of course, it is only with the deepest respect, that I venture not to follow this dictum, but my own opinion more closely coincides with that of Howell, C.J.A., in *Rex v. Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, and *Rex v. Foulkes*, 13 Can. Cr. Cas. 370, 17 Man. L.R. 613, considered cases, and that of Magee, J.A., in the dissenting opinion, rather than that of Wurtele, J., in the cases just cited. In both of those cases the defendant had pleaded to the indictment before it was sought to elect in favour of a trial in the other Court. Therefore anything said as to an indictment found, but not pleaded to, was *obiter*.

Mr. Justice Wurtele's reporter puts it thus, in *Wener's case*, [6 Can. Cr. Cas., headnote 2, p. 406]:—

2. If an accused party *neglects* to take the necessary steps to elect in favour of a speedy trial without a jury in the special Court for speedy trials, *before he has pleaded to an indictment preferred* by leave of the Judge of a jury Court, *his plea to such indictment* will conclude him from electing against a jury trial.*

But, in the opinion, I admit the Judge seems to have dealt with the case of an indictment returned, and in the case of *King v. Komiensky*, 6 Can. Cr. Cas. 524, at 528, the same learned Judge, although he had dealt with the case of an indictment returned, says, and it was all that was necessary for him to say in either case:—

As I have already stated, when an indictment has been found and *pleaded to*, the accused's plea fixes conclusively the tribunal and the mode of trial.

*EDITOR'S NOTE:—This headnote was approved of by the late Mr. Justice Wurtele. It may further be noted that the preliminary enquiry was before a Judge of the Sessions of the Peace having jurisdiction also under the speedy trials clauses so that the accused had an opportunity of then stating his election.

And again, page 529:—

It surely was never intended that after an indictment has been found, after the accused has been arraigned and has pleaded to the indictment, and when the Court is in session ready to proceed to his trial, the accused could arbitrarily remove the case from the Court seised with it and having competent jurisdiction, to another Court.

In the *Thompson* case, [*R. v. Thompson*, 14 Can. Cr. Cas. 27], Howell, C.J.A., held that

The right of an accused person bound over by the magistrate at the preliminary hearing to appear and take his trial at the assizes, to elect under section 825 of the Criminal Code to be tried by a Judge without a jury, may be exercised even after the finding of a true bill by the grand jury on an indictment upon the same charge preferred by the Crown at the next assizes, if such election is made before plea to the indictment.

He distinguishes the *Komiensky* case, 6 Can. Cr. Cas. 524. He says:—

Of course, if the accused person pleaded to the indictment, it might well be said that he has elected his forum and cannot now elect to be tried without a jury, unless, perhaps, as provided for in section 828.

First, in my opinion, the provisions of the Act already quoted, and other provisions, point to the conclusion that a prisoner, the conditions of a charge and depositions and a committal, or an awaiting trial thereon, whether in custody or on bail, being present, has a right, at some time or another, to exercise the option of being tried with or without a jury.

The word "may" in the first sub-section of section 825, read in the light of the other provisions, seems to me to create a duty on the part of the official to afford a prisoner the opportunity to exercise this option.

Take sub-section 5; why is express provision made that the Attorney-General may, when the offence has attached to it a punishment exceeding five years, require the charge to be tried by a jury, and even if the prisoner has formally made his election, if, as is contended, the Attorney-General may require it in any kind of a case?

Then look at the mandatory provisions. Take sub-section 6. If the prisoner, even if he is at large under bail, may notify the sheriff that he desires to make his election, and the sheriff *shall* notify the Judge, and sub-sec. 7:—

In such case, the Judge, having fixed the time when and the place where the accused shall make his election, the sheriff *shall* notify the accused thereof and the accused shall attend at the time and place so fixed and the subsequent proceedings shall be the same as in other cases under this Part.

Then sec. 826:—

Every sheriff *shall*, within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial (here read in the definition in sub-sec. 4 of sec. 825, “who is otherwise in custody awaiting trial on the charge” for the words committed for trial are extended to that case), notify the Judge, etc., whereupon, with as little delay as possible, the Judge *shall* cause the prisoner to be brought before him.

Sec. 827 says, [in effect] :—

The Judge, having first obtained the depositions, etc., *shall* state to the prisoner (a) the offence; (b) that he has the option to be tried forthwith before a Judge without a jury or be tried in the ordinary way.

Then, no doubt, someone started the contention that the object of these provisions were merely to give a speedy trial, and if the prisoner could have a trial as speedily in the jury Court as under these provisions, the prisoner was not to have the option. But Parliament by amendment intervened, 1875, ch. 45, sec. 2, now Cr. Code 825, sub-sec. 3, and said:—

“Whether the jury Court or the grand jury thereof is, or is not, then in session.”

Then if these provisions are mandatory and the prisoner has the right to exercise the option, when may the Attorney-General override that option or prevent its exercise and try the prisoner with a jury? We have the expression of one thing, viz., when the offence has attached to it a punishment exceeding five years. The usual implication follows. Is the Attorney-General to have the option in all cases and by procuring an *ex parte* indictment (it usually is *ex parte* and without notice) deprive a defendant of the right to exercise the option? Surely there is not to be a race about it between him and the prisoner, each one trying for the first step in his favoured Court. The grand jury may, as these provisions shew, be then sitting, and the prisoner would be too heavily handicapped.

Why is the return of the indictment to mark the line beyond which there can be no election? It is not at that stage that the

Supreme Court becomes "seised of jurisdiction" or "seised with the prosecution." It is long before that seised with jurisdiction and with the prosecution; proceedings before the grand jury take place in that Court, and many other proceedings may be taken there before that period. I do not know why Wurtele, J., adopted that as the line.

It is not as if there were two Courts which had concurrent jurisdiction. Of course, then, proceedings would go on in the one in which they were first commenced. It is the case of a transfer or removal of the case from the Supreme Court to the County Court Judge, and that happens when the defendant has exercised his option and I suppose, when in pursuance of the election, the papers are sent to the other Court. That would happen in the case of a removal by a writ of *certiorari*. The statute expressly draws no such line as to the return of the indictment. The defendant must have the opportunity to elect. The officials are rigidly charged with the duty of notifying the Judge so that the defendant may have that opportunity. How can a defendant be said to have neglected, or to have waived his right or to have deprived himself of the opportunity to exercise his option when there was not afforded to him an opportunity to elect? Why should the moment when an indictment has been returned behind his back mark the limit? But, on the other hand, when he pleads to an indictment, then he may be held to have waived his right to exercise the option. That is his first voluntary act. One cannot waive a right without knowledge or intention or *nolens volens*.

The reporter in *Wener's* case, [6 Can. Cr. Cas. 406] thought neglect had something to do with it. Therefore I agree with the judgment of Howell, C.J.A., and not with Wurtele, J., when he says in *Wener's* case, 6 Can. Cr. Cas. 406:—

If no election has been made before an indictment is returned founded on the facts or evidence disclosed by the depositions taken at the preliminary enquiry, the accused has no statutory right to demand a trial before a Judge of sessions without a jury and avoid a trial on the indictment, but if an accused has elected for a speedy trial before a bill of indictment has been preferred, he cannot be deprived of that right.

Again recurring to section 828, sub-sec. 2. Why would Parliament provide for the opportunity of re-election, after an

election in favour of the jury Court has been made, *although* an indictment has been preferred, and not for election in the first instance although an indictment has been preferred, unless it thought that the case was covered by the other provisions already made and it was unnecessary to enumerate that case? Why deal with an extreme case when the election had been made and the tribunal with the jury fixed, unless an intermediate case was included? There could not well be a contingency unforeseen by Parliament. That was a case likely to happen much more frequently than the other. I refer to Endlich on the Interpretation of Statutes, sec. 19. I think the leaning ought to be against the idea of a *casus omissus*.

When Parliament did draw the line of exercising the option as it does in sec. 828, sub-sec. 2 (the re-election provision), it provided that he may exercise "the election at any time before such trial has commenced." When does a trial commence? Story, J., in *United States v. Curtis*, 4 Mason 232 at 236, says:—

Now, in the sense of the common law the arraignment of the prisoner constitutes no part of the trial. It is a preliminary proceeding and, until the party has pleaded, it cannot be ascertained whether there will be any trial or not. The elementary books are full to this purpose.

Mr. Justice Blackstone, in the passage cited at the bar (which is a mere transcript from Lord Hale), says:—

To arraign is nothing else but to call the prisoner to the bar of the Court to answer the matter charged upon him by the indictment. If, upon the arraignment, the prisoner pleads guilty, there can be no trial at all, for there remains no fact to be tried. . . . Indeed the very forms of the proceeding upon the arraignment are so complete evidence of the legal meaning of a trial, that of themselves, they are decisive. When the prisoner, upon his arraignment pleads not guilty, he is then asked how he will be tried, and the response in case of a trial by jury is that he will be tried by God and his country. "When therefore," says Mr. Justice Blackstone, "a prisoner, on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors," etc.

So Lord Hale says: "After the prisoner hath pleaded and put himself upon the country, the next thing in order of proceeding is the trial of the offender. The very form, too, of calling the prisoner when he is to be put on his trial by the jury shew the legal sense of the terms. He is then told by the clerk, in the language of the law, that he is now set at

the bar to be tried and he is to make his challenge, before the jurors are sworn," In short, so far as authorities or reasoning or forms go, there can be no legal doubt that, by the term "trial," is generally intended in the law, the actual trial of the prisoner by jury.

The word "preferred" in that provision simply means prosecuted, or carried on or found: *The Queen v. Pembroke*, 3 Q.B. 901.

We still use these very forms mentioned by Story, J., in criminal cases in Nova Scotia, and we could not very well tell a defendant "it is too late to elect now the trial has commenced" (he may have been arraigned several days before) when the forms before the Court to be addressed to the prisoner proclaim that it has not yet commenced. Why allow the defendant the right to elect up to the time of the commencement of the trial in one case and in the other cut off the right because an indictment has been returned?

I am not quite able to appreciate the argument that giving a defendant the right to elect up to that time, i.e., after indictment returned, will increase trouble and expense going on before the grand jury. If he may elect up to the moment before the return of the indictment to what appreciable extent is the trouble and expense increased by giving him the right to do it after the return of the indictment?

Parliament did not consider that additional trouble and expense in the re-election provision which gives the defendant the right to elect up to the time of the commencement of the trial.

MacLaren, J.A., in *Rex v. Sovereign*, 20 Can. Cr. Cas. 103 at 110, 4 D.L.R. 356 at 361, thinks that

Unless the opinion of Württele, J., is upheld, speedy trials would become a misnomer and the provision would be defeated, in fact converted into machinery to retard and delay.

That result does not happen in this province. Under the statute, the sheriff has twenty-four hours after the moment of the custody to notify the Judge and the Judge must cause the prisoner to be brought before him "with as little delay as possible." The prisoner has nothing to say about it, except, of course, to ask for adjournment as he may do in the other Court,

or in any Court. Parliament did not seem to be impressed with that view when it passed section 828, which gives the prisoner a chance to make another double.

Even when the defendant is out on bail, 825, sub-sec. 6, and has the initiation of the proceedings for a trial without a jury by notifying the sheriff and does not notify him there will be no greater delay except by several days than in the ordinary case of a jury trial. The defendant is brought in to plead to the indictment, he must plead or exercise his option to go to the other Court, and being necessarily then in custody, the sheriff has twenty-four hours to notify the Judge and so on.

I am not very familiar with the possible turnings of a prisoner, but in this province when the Court for criminal cases sits only twice a year in each county the speedy trials provisions seem to work well.

The counsel for the Judge asks what becomes of the indictment if he may elect then. I ask what becomes of the indictment in the case of re-election under section 828? What becomes of the indictment in any case where several are found and a trial and conviction upon one of them only? The case of *Rex v. Burke*, 24 O.R. 64, shews what becomes of the indictment.

Of course, I can only speak with the deepest respect of anything said by the learned Judges I have named in this opinion, and must be understood in that sense.

I think the County Court Judge has jurisdiction, the prisoner consenting, to try this case without a jury, therefore that the mandamus must go, of course, without costs.

LONGLEY, J., concurred in allowing the application.

DRYSDALE, J.:—This motion demands I think and only requires a proper interpretation of the words in sub-section 4 of sec. 825 of the Criminal Code reading as follows. "Who is otherwise in custody awaiting trial on the charge."

It seems to me that the policy of the Legislature has been to extend in the first instance the right of speedy trial to all cases where jurisdiction is conferred upon the County Court

Judge, that is to say, the various amendments indicate a legislative intention to confer the right of election upon all persons charged with those offences which come within the powers of the County Court Judge, no matter how the person charged is held. I am of opinion that when sub-section 4 enacted that when a person has been surrendered by his sureties and is in custody on the charge or who is otherwise in custody awaiting trial on the charge, it was intended that a case of the kind at bar should be covered, in other words, that a situation such as presented in this motion was intended to be provided for and that the County Court Judge has jurisdiction in the premises.

RITCHIE, J.:—This is an application for a mandamus to require the learned Judge of the County Court to proceed in regard to the charge against Walsh under section 827 of the Criminal Code.

The Judge has declined to proceed and his view finds support in the remarks of the late Chief Justice Moss and Mr. Justice Maclaren, in the case of *The King v. Sovereign*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356. The facts of that case, however, make it clearly distinguishable from this case. In this case Walsh is in custody awaiting trial on the charge. Sovereign was not in custody awaiting trial on the charge, Mr. Justice Maclaren, [20 Can. Cr. Cas. 109], says:—

As stated above, the indictment in this case did not originate with and is not based upon a charge or depositions taken before a magistrate, but is based solely upon the written consent given by the trial Judge, and the Code does not provide for a trial before a Judge without a jury in such a case.

Sovereign was committed for trial, admitted to bail and appeared for trial in accordance with his recognizances. Then an indictment, not based upon the charge on which he was committed, was preferred against him by the consent in writing of the Judge.

Walsh was put upon his trial under section 696 of the Code on a charge of indecent assault, he was admitted to bail by the stipendiary magistrate, in his absence an indictment was found against him by the grand jury, a bench warrant was is-

sued against him under which he was arrested and is now in custody awaiting trial on the charge.

When the Speedy Trials Act was first passed, as soon as the Supreme Court was in session, the prisoner's right of election was gone and he was bound to take his trial before a jury, and, as the law originally stood, the person accused of crime, if admitted to bail, had no right of election, but, since the Act was passed, "the march of legislation" (to use the words of Chief Justice Howell of Manitoba in *R. v. Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, has been steadily in the direction of enlargement of the right of election.

I have grave doubt as to whether or not this tendency is in the best interests of the administration of the criminal law, but that is for Parliament, and not for me. My duty is to ascertain to the best of my ability the intention of the statute and give effect to it.

The trend of legislation is very clearly shewn by sub-sec 2 of sec. 828 of the Code, which is as follows:—

Any prisoner who has elected to be tried by jury may, notwithstanding such election, *at any time before such trial has commenced*, and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall be thereupon the duty of the sheriff and Judge or prosecuting officer to proceed as directed by sec. 828.

This section provides that re-election may be made after an indictment has been preferred and I think also after it has been found, because it may be after indictment preferred, and *at any time* before the trial has commenced.

There is, of course, an intervening time between the finding of the indictment and the commencement of the trial; the trial cannot commence until after the prisoner has pleaded, and the re-election may be at any time before the commencement of the trial. This right of re-election after indictment found, is, to my mind, a very clear intimation as to what the policy of the legislation is.

In this case, Walsh has not, as yet, elected at all. The contention for the Crown, is that he cannot do so after indictment found, that the Judge under the Speedy Trials Act would have no jurisdiction. If this contention is adopted, the re-

sult is a curious one. A man, as I have pointed out, can re-elect after indictment found, but he cannot elect. I think it is very difficult to come to the conclusion that this is intended by the statute.

In my opinion Walsh has the right now to elect. This view is supported by Chief Justice Howell of Manitoba in *The King v. Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608.

Sub-sections 3 and 4 of section 825 of the Code are as follows:—

3. Such trial shall be had under and according to the provisions of this Part out of sessions and out of the regular term or sittings of the Court, and whether the Court before which, but for such consent, the said person would be triable for the offence charged or the grand jury thereof, is or is not *then* in session.

4. A person who has been bound over by a justice or justices under the provisions of sec. 696, and has been surrendered by his sureties, and is in custody on the charge, or *who is otherwise in custody awaiting trial on the charge* shall be deemed to be committed for trial within the meaning of this section.

By the section, every person committed for trial of certain offences, of which indecent assault is one, may, with his own consent, be tried under the Speedy Trials Act.

Chief Justice Howell expresses the opinion that sub-section 3 cannot be read to mean that a man cannot elect while the Court is in session but may be tried while the Court is in session. I fully appreciate this view, but, in my opinion, sub-section 4 makes the matter clear.

Walsh has been bound over under section 696, he has not been surrendered by his sureties, but he is "otherwise in custody awaiting trial on the charge."

With very great respect for the opinions of those who hold a different view, I think the statute has in clear and distinct language given this man, who is now in custody awaiting trial the right to elect. I would escape from this conclusion if I could, but I cannot, as it seems to me, do so without disregarding the language of sub-section 4.

In my opinion, the accused person Walsh is within its terms, and therefore has the right of election.

Mandamus ordered.

[SUPREME COURT OF ALBERTA.]

BEFORE HARVEY, C.J., BECK, AND SIMMONS, JJ.

REX v. CRUIKSHANKS.

1. JUSTICE OF THE PEACE (§ III—10)—JURISDICTION—SITTING AT REQUEST OF ANOTHER JUSTICE.

The exclusive jurisdiction which by Alberta Statutes 1907, ch. 5, is to attach to the first justice of the peace taking cognizance of the case is sufficiently displaced within the exception authorizing another justice to act on request, where the justice taking the information did so at the request of the trial justice accompanied by the latter's intimation that he himself would conduct the trial; acquiescence in such proposition is equivalent to a counter-request by the justice taking the information that the other justice should take the trial.

2. DENTISTS (§ I—6)—UNLAWFUL PRACTICE—MECHANICAL DENTISTRY—LICENSE.

Taking impressions of the gums and filling teeth as a business, constitutes a practice of dentistry which, in Alberta, can be done for hire and gain only by a licentiate under the Dental Association Act, Alta. 1906, ch. 22.

3. DENTISTS (§ I—6)—UNLAWFUL PRACTICE—SEVERAL ATTENDANCES ON ONE PERSON.

While a single act does not constitute a "practising" of a profession or trade, the practice of the profession of dentistry is shewn by services for only one customer on different dates, *ex. gr.* the taking impressions of the gums and fitting the plates for artificial teeth.

[As to proving more than a single act in infringement of licensing statutes against "practising" a profession, see also *R. v. Lee*, 4 Can. Cr. Cas. 416; *R. v. Whelan*, 4 Can. Cr. Cas. 277; *R. v. Raffenberg*, 15 Can. Cr. Cas. 297; *R. v. Armstrong*, 18 Can. Cr. Cas. 72. As to separate liquor sales at the one time and place, see *Mahoney v. Leschinski*, 10 Can. Cr. Cas. 169, 1 D.L.R. 535.]

4. CRIMINAL LAW (§ IV F—131)—GREATER PUNISHMENT FOR SUBSEQUENT OFFENCE—CR. CODE SECS. 851, 963.

Sections 851 and 963 of the Criminal Code, as to the procedure in case of a charge for a second or subsequent offence involving an increased penalty, apply only to indictable offences.

5. SUMMARY CONVICTIONS (§ III—30)—PROCEDURE ON CHARGE OF SECOND OFFENCE WITH ADDED PENALTY.

As Part XV. of the Criminal Code as to summary convictions contains no provision requiring the magistrate on the trial of a charge for a second offence involving a greater punishment than for a first, to proceed first as to the later offence charged, and not to ask the defendant whether he had been previously convicted for the like offence until after conviction for the alleged second offence, the prosecutor should allege and prove in a prosecution for a second offence under the Dental Association Act, Alta., 1906, ch. 22, the first conviction as part of his case before conviction of the subsequent offence, for that statute contains no clause to the contrary such as is commonly found in liquor license statutes.

DECIDED: March 30, 1914.

MOTION to quash two summary convictions for unlawful practice of dentistry in breach of the Dental Association Act (Alta.)

J. M. Carson, for the respondent, Crown.

J. McKinley Cameron, for the appellant, accused.

The judgment of the Court was delivered by

SIMMONS, J.:—Counsel have agreed that this application may be treated as an appeal from the decision of Mr. Justice Stuart, who dismissed an application by way of certiorari to quash two convictions made by police magistrate Sanders against the defendant for practising dentistry contrary to the provisions of the Dental Association Act (Alta.) 1906, ch. 22, or in the alternative as an application *de novo* to this Court to quash these convictions. Counsel also agreed that the questions of law involved should be decided upon the following material: the information and complaint and conviction in each case and an affidavit of police magistrate Sanders, and that the contents of these documents shall be treated as the material facts.

The information on the first charge is as follows:—

That J. R. Cruikshanks of Calgary, a person not holding a valid certificate of license to practise dentistry under the Dental Association Act of the Province of Alberta, and not duly registered under said Act, did on June 1, 1913, and July 5, 1913, practise the profession of dentistry for hire and gain, at Calgary in the province of Alberta, contrary to the said Dental Association Act of the Province of Alberta, by taking an impression in a soft substance of the upper gums of the mouth of Annie Mason and making therefrom a plate and set of artificial teeth for and to fit the upper gums of the said Annie Mason on June 1, 1913, for money, and by treating and filling a tooth of one Charles A. Brown on July 5, 1913, for money.

The second information is dated July 31, 1913, and charges the defendant

that on the 25th, 26th, 28th, 29th and 30th days of July, 1913, he took impressions in a soft substance of the gums of one Elizabeth Fletcher and made therefrom two plates and a set of artificial teeth for the sum of \$45, of which \$5 was paid by her to the defendant.

Four grounds of appeal are raised by the applicant:—

1. The acts alleged do not constitute the practice of dentistry.
2. A single act does not constitute the practice of dentistry.

3. Priority of jurisdiction in the magistrate who received the information excluded the jurisdiction of police magistrate Saunders, who tried the actions.

4. Magistrate wrongfully received evidence of the first conviction before convicting on the second charge.

Dealing with the third question first the appellants rely on the statute ch. 5 of 1907, sec. 9, amending the Act respecting Police Magistrates and Justices of the Peace, which is as follows:—

Jurisdiction in any particular case shall exclusively attach in the first justice of the peace, or where more than one justice is required the first justices to the required number duly authorized who has or have possession and cognizance of the fact: Provided, that at the request of any such justice or at the unanimous request of any such justices where more than one justice is required, any other justice or justices may take part in any case.

Section 9, sub-sec. (5), of ch. 13 of 1906, an Act respecting Police Magistrates and Justices of the Peace, is as follows:—

It shall not be necessary for the police magistrate or justice who acts before or after the hearing to be the police magistrate or justice or one of the justices by whom the case is to be or was heard and determined.

It is contended that the effect of the amendment of 1907 is to repeal sub-sec. (5) of sec. 9 of ch. 13, 1906. I do not consider it necessary to decide that matter.

In the magistrate's affidavit it is set out that, in the case of the second information, the informant appeared before him and the magistrate requested J. R. Royce, a justice of the peace residing in Calgary, to take and receive the information and complaint of the said Mason, and he, the said Sanders, informed Royce that he, Sanders, would hear the evidence and conduct the hearing and take sole charge of the balance of the case, all of which the said Royce acquiesced in and agreed to. I am of the opinion that the acquiescence of Royce was equivalent to a counter-request that the magistrate Sanders would take charge of the hearing. It is convenient to dispose of grounds (1) and (2) together.

Dentistry is defined:—

A special departure of medical science embracing the structure, function and therapeutics of the mouth and contained organs, specifically the teeth, with their surgical and prosthetic treatment. (*Encyclopaedia Britannica*).

The science of dentistry, like many others, has advanced in later times, especially in the direction of preserving and repairing teeth and in substituting artificial teeth, and we are entitled to take cognizance of what is common knowledge in this regard. It is contended that the manufacture and supplying of artificial teeth is a mechanical trade and does not come within the term "practice of dentistry." There may be a good deal of force in this argument in so far as it applies to the manufacture of artificial teeth, but the taking of impressions of the gums and the connecting of these teeth in plates to fit the gums and filling teeth are not acts which it can be said are not included in the term "practice of dentistry." The preamble of the Act recites:—

Whereas . . . it is expedient for the protection of the public that a certain standard of qualification should be required of each practitioner of said profession, etc.

I apprehend that the legislature considered it necessary that a certain standard of qualification was necessary before any one should be allowed to perform surgical or prosthetic work upon the mouth in relation to the teeth. Common knowledge informs us that these acts constitute what is generally accepted as within the term practice of dentistry, and one who takes impressions of the gums and who fills teeth is such a person as the legislature must have contemplated when it enacted that a certain standard of professional knowledge was necessary in the public interest. On the other ground, that a single act does not constitute an offence, the appellant fails upon the facts. There is no doubt that the law does not contemplate a single act as constituting the practice of a profession or trade: *Apothecaries Co. v. Jones*, [1893] 1 Q.B. 89 at 95.

The first information relates to acts performed for two different persons on different days. The information of July 8 charges two specific acts of practice at different dates upon different persons, so that it cannot be contended there was only a single act. The information might more properly have charged the defendant with practising dentistry within the period of the first and second acts, and the specific acts which now appear upon the information would have constituted the evidence of

the practising, but no objection has been taken on this ground. The second information relates to specific acts performed for one person at different dates, and the same remarks would apply as to the form of the information. The fact that the work was all done for one person cannot bring them within the description of a single act.

The grounds raised under No. (4) are very important. Sections 851 and 963 of the Code provide for the form of indictment and procedure in the case of a person charged with an offence for which a greater punishment may be inflicted by reason of such previous conviction. The indictment must state that the offender was at a certain time and place convicted of an indictable offence or offences (851 Code). Under sec. 963 Cr. Code, the defendant shall be arraigned in the first instance upon so much only of the indictment as relates to the subsequent offence, and if he pleads not guilty the trial proceeds upon the subsequent offence, and, if convicted, the defendant then is asked if he was previously convicted, and if he does not admit it the jury shall then be charged to inquire as to such previous conviction. Provisions having the same effect are in the Canada Temperance Act and the Liquor License Acts of the different provinces. No such provision is in the Dental Act. Part 15 of the Code relating to summary convictions contains no such provision, and secs. 851 and 963 of the Code apply to indictable offences only. It was, therefore, necessary that the prosecutor should allege and also prove the first conviction as part of his case before conviction of the subsequent offence.

The application should be dismissed with costs.

Convictions affirmed.

[SUPREME COURT OF ONTARIO.]

BEFORE MEREDITH, C.J.C.P., IN CHAMBERS.

REX v. ROACH.**1. CRIMINAL LAW (§ II B—44)—RIGHTS OF ACCUSED—FORMAL PROCEEDINGS—ANSWER AND DEFENCE TO SPECIFIC CHARGE.**

A person upon trial for a crime has a right to hear all the evidence adduced against him and to insist, as a matter of right, that the formalities of the law as to criminal trials are complied with; and when formal proceedings are in strict law required, *ex. gr.*, an arraignment upon a specific charge made known to the prisoner at the hearing before a magistrate, the absence of the required proceedings is a ground for setting aside the conviction without regard to the question whether or not any substantial injustice had resulted to the accused.

[*Martin v. Mackonachie*, 3 Q.B.D. 730, 770, applied.]

2. INDECENCY (§ I—5)—CRIMINAL PROCEEDINGS—SUMMARY CONVICTION—UNCERTAINTY AND MULTIPLICITY.

A summary conviction for that the accused did "at various times and in public places unlawfully commit acts of indecency" at a named city within a period of two months specified is invalid for uncertainty and as including several offences, and no amendment is permissible on certiorari, if the evidence at the hearing included several distinct offences within the period named in the conviction and the magistrate had neither indicated any particular occasion regarding which he found the accused guilty nor found him guilty in respect of all of such occasions.

3. SUMMARY CONVICTIONS (§ III—30)—LIMITATION OF CHARGE AND EVIDENCE TO ONE SPECIFIC OFFENCE.

The necessities of justice as well as the provision contained in sec. 710 of the Criminal Code require that a summary conviction must be for a single and certain charge; and where there is no need for giving evidence of other offences to prove intent, the charge and the evidence at any one trial should be confined to a single offence.

[*Rex v. Sutherland*, 2 O.W.N. 595, *Reg. v. Hazen*, 20 A.R. 633, and *R. v. Alward*, 21 O.R. 519, referred to.]

4. CERTIORARI (§ II—28)—PRACTICE AS TO COSTS—ALTERNATIVE PROCEDURE OF APPEAL AVAILABLE—SUMMARY CONVICTION UNDER CRIMINAL CODE.

It is a ground for refusing costs to the successful defendant on his conviction being quashed on certiorari that he might instead of taking certiorari proceedings have appealed to a local court from the summary conviction and that the local court would have had even wider powers upon the appeal than were available to the superior court in the certiorari proceedings.

DECIDED: June 26, 1914.

Motion by the defendant to quash a magistrate's conviction.
The conviction was quashed.

M. J. O'Reilly, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

MEREDITH, C.J.C.P.:—There was no real trial, in a legal sense, of the applicant, though he was found guilty of a crime for which he might have been imprisoned with hard labour, for six months, and fined \$50, on a summary conviction.

By the term "real trial" I mean that unprejudiced, full, and fair trial which every one charged with a crime is entitled to, and which the Criminal Code of Canada explicitly requires: see secs. 721, 714, 715, 942, 943, 944, 686, and 682; a trial none the less, but sometimes the more, necessary where preconceived notions of guilt exist, even though they may be well-founded. Such a trial does not necessarily involve any waste of time, nor need more be expended in it than is sometimes spent in trials which have to be gone over again because not real trials. Waste of time is often the result of superfluous words, and other things not pertinent.

No information was laid against the accused man; no specific charge was made against him; only a general one of indecent exposure. Neither the shorthand notes of the trial, nor the magistrate's full report of the case, shews that there was any arraignment of the prisoner; see sec. 721 of the Criminal Code; nor that he was otherwise informed, in any formal way, of the charge against him. The school-girl witnesses were not sworn, although there does not appear to have been good reason for not taking their testimony under oath. According to the testimony of a bystander, who is described as a clergyman, the testimony of the girl-witnesses was whispered into the magistrate's ear; and the prisoner's request for an adjournment of the trial so that he could procure counsel to conduct his defence was refused, the magistrate telling him that a lawyer could do him no good. The only reason suggested for the whispered evidence is modesty; but modesty, whether properly described or false or not, cannot justly be permitted to deprive any person upon trial for a crime of his right to hear all the evidence adduced against him.

And, after the prisoner was represented by counsel, he was

not permitted—as the shorthand notes of the trial clearly shew—to make his full defence, as, whether strictly regular or not, he ought to have been; but was restricted to evidence of his good character.

It ought not to be, and it may not be, necessary, even if excusable, to repeat again the oft-quoted words of the Lord Chief Justice of England, upon this subject, so forcibly expressed in the case of *Martin v. Mackonachie* (1878), 3 Q.B.D. 730, 775, but I do so lest we Justices, whether of superior or inferior Courts, forget; and because that case is in point upon the main question involved in this case, as the first words I intend reading shew: "It seems to me, I must say, a strange argument in a court of justice, to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceeding should be upheld. In a court of law such an argument *à convenienti* is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in *pœnam* are, it need scarcely be observed, *strictissimi juris*; nor should it be forgotten that the formalities of the law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has a right to insist upon them as a matter of right, of which he cannot be deprived against his will; and the Judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the Legislature to amend. The Judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself."

Amendments by the Legislature, from time to time, to the law

have made escapes from substantial justice on mere technicality few and far between, if they ever need occur. And I may add that, as the provisions of the law exist for the purpose of making a case so plain that substantial justice can be done, how is it possible to assert that justice has been done when some of the means the Legislature has deemed necessary in reaching that end have been disregarded?

But, apart from all such irregularities, the conviction, upon its face, is plainly invalid. It is: for that the accused man, within two months prior to the 20th day of May, 1914, did, in the city of Hamilton, "at various times and in public places unlawfully commit acts of indecency . . ." That the conviction is invalid because it includes several offences, and is uncertain, seems to me to be too obvious to require, or excuse, much argument: and, unfortunately, it is not reparable under any of the wide powers of amendment by the Criminal Code conferred upon this Court on motions such as this; because the evidence relates to a number of offences, entirely separate from one another, extending over two years, most of them within "two months prior to the 20th day of May, 1914;" and it is impossible to pick out any one of them as one upon which the prisoner was found guilty: he has not been found guilty on all the occasions testified to, nor has the magistrate in any way indicated any particular occasion regarding which he found the man guilty; indeed, it is hardly likely that he made any finding of that character; but is altogether likely that he merely found that, having regard to all the evidence, the man must have been, on some occasion or other, guilty. It is, therefore, quite impossible to change the generality of the conviction into a particular one out of all that were deposed to with more or less weight; which is enough to invalidate the conviction, without considering whether it would be proper to amend, in the circumstances of this case, were it possible.

The evidence should have been confined to one offence as also the charge should have been; there was no need for giving evidence of other offences to prove intent; and there was no such purpose or excuse in adducing it; the evidence in each case was given for the one and same purpose, namely, to prove the pri-

soner guilty of separate and distinct offences, in a trial upon all that might come out in the evidence.

Since the argument, Mr. Cartwright has referred me to the case of *Rex v. Sutherland* (1911), noted in 2 O.W.N. 595; but that case affords to me no assistance in this case. It was, doubtless, intended to be decided under the special provisions of the liquor license laws of this Province, and not intended for citation in support of a similar ruling in a case such as this: as to the liquor license laws, the well-known cases of *Regina v. Hazen*, 20 A.R. 633, and *Regina v. Alward*, 21 O.R. 519, deal with the subject to some extent. But, if not, I must hold the law to be quite too plain, that convictions must be, generally speaking, single and certain, to hold the conviction in question, which offends so much in these respects, to be supportable upon any case. The necessities of justice, as well as the laws of the land, require that they be single and certain: see the Criminal Code, sec. 710, sub-sec. 3.

It is, of course, quite true to say that the gist of the charge is the crime or other offence, whether indecent exposure or murder or an illicit sale, but none of these offences can be committed except in an actual concrete case, and there can be no legal conviction or regular prosecution except upon such a case. It ought not to be necessary to say so.

The conviction must be quashed, but without costs; and the usual protective terms may be inserted in the order quashing it. There is special reason for not awarding the applicant any costs; he might have appealed to a local Court, which Court would have had wider power upon the appeal than this Court has on this motion; and he ought to have done so.

Conviction quashed without costs.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE SIR FREDERIC BARKER, C. J., McLEOD, WHITE, BARRY
AND McKEOWN, JJ.

REX v. DAVIS; *Ex parte* MIRANDA.

1. CERTIORARI (§ I A—9)—JURISDICTION—WANT OR INSUFFICIENCY OF EVIDENCE—LIQUOR LAW TAKING AWAY CERTIORARI.

Where a magistrate has jurisdiction to enter upon the inquiry as to an offence under a liquor law, he is not ousted from that jurisdiction by any want or insufficiency of the evidence to support the charge, at least where there was relevant evidence and it was not palpably inadequate, and a certiorari application must be dismissed if the right to certiorari has been taken away by statute as to offences of that class.

[*Ex parte Daley*, 27 N.B.R. 129, considered.]

2. CERTIORARI (§ II—24) — SUMMARY CONVICTION UNDER LIQUOR LAW — WEIGHT OF EVIDENCE.

The rule in civil cases as to supervision of the findings of a jury on the ground that they are against the weight of evidence do not apply to a certiorari application for review of the findings of a magistrate in respect of an offence as to which the right of certiorari of convictions thereunder has been taken away by statute; certiorari can only be granted in such cases in the event of the magistrate acting without jurisdiction.

[*Solomon v. Bitton*, 8 Q.B.D. 176, and *Phillips v. Martin*, 15 A.C. 193, distinguished.]

DECIDED: November 21, 1913.

APPLICATION on the return of a rule nisi to quash a conviction for selling liquor in violation of the Liquor License Act, C.S.B.N. 1903, c. 22.

The conviction was sustained.

R. B. Hanson showed cause.

J. D. Phinney, K.C., in support of the rule.

The judgment of the Court was delivered by

BARKER, C.J.:—This is a motion to make absolute a rule nisi to quash a conviction, (removed into this Court by certiorari) against Miranda for having sold intoxicating liquors without a license. The information which was laid before R. H. Davis, a Justice of the Peace and Stipendiary Magistrate for Kent County, alleges a sale between June 1st and July 30th, 1913. Five witnesses were examined, the applicant was put upon his defence; he declined to give any evidence and the Justice imposed

a fine of \$50 and costs. The rule was obtained on the sole ground that there was no evidence whatever upon which the magistrate could legally convict, and this is the only question to be considered. It is contended that the facts take the case out of the class of *Ex parte Daley* (1888), 27 N.B.R. 129, and the numerous other cases in which that case has been followed.

It is admitted that this application can only succeed on shewing that the justice acted without jurisdiction. No question arises as to the regularity of the proceedings, and the magistrate's jurisdiction over the person and offence is not disputed. He therefore had jurisdiction to enter upon the inquiry and having done so, it is I think impossible for him to be ousted from that jurisdiction by any want or insufficiency of the evidence to support the charge. The determination to be reached as a result of that evidence has been given to the justice; there is no appeal on that ground to this Court and the right to remove such convictions by *certiorari* on that ground has been taken away.

It does however exist where there has been a want or excess of jurisdiction in the magistrate and the applicant must bring his case within that limit in order to succeed. In order to do so his counsel has advanced the proposition that the justice's jurisdiction is a jurisdiction to hear and determine upon evidence, and if he determines without any evidence at all or upon evidence altogether irrelevant to the inquiry or so palpably insufficient and inadequate for the purpose as to be valueless, he assumed a jurisdiction never conferred upon him or acts in excess of one which has been conferred upon him. When a case of that nature arises it will be time enough to consider it. A perusal of the evidence returned here has convinced me that the facts in evidence and upon which the justice acted, fall far short of filling the conditions under which it is contended the conviction would be quashed for want of jurisdiction in the magistrate. It appears by this evidence that the applicant Miranda is a farmer in a small way, living at or near Richubucto village. On Sunday, the 20th July last, these men were at Miranda's drinking what they called beer or lemon beer. Some of them, at all events, remained there for the afternoon. Their object in going there does not appear unless it was to get something to drink. Miranda kept no shop—his house was distant from one to four miles away from the houses

of these witnesses—they bought from Miranda drinks and bottles of this so-called beer and paid him for them. They drank the beer freely and three of them came to John Richards' house that night between 11 and 12 o'clock, about a mile from Miranda's, "all fairly well drunk," as Richard says, or "pretty drunk" as Thibideau describes them. They give no explanation of their doings in answer to the natural inference to be drawn from these undisputed facts. I think the conviction is quite right, and that the justice in drawing the inferences which he did and in making the conviction not only had ample jurisdiction but exercised it in a very sensible way. If I thought differently I should still think the conclusion of the justice not open to review by this Court.

Mr. Phinney seemed to attach importance to the rule governing Courts in disposing of motions for a new trial on the ground that the verdict is against the weight of evidence and sought to make it applicable to a case like the present. That rule as laid down in *Solomon v. Bitton* (1881), 8 Q.B.D. 176, *Phillips v. Martin* (1890), 15 A.C. 193, and many other cases, is simply a rule of law of modern date to govern Courts of law in the case I have mentioned. It has, I think, no bearing whatever on a proceeding like the present. The finding of a jury upon facts is subject to the supervision of the Court and is in no sense final, while, as I have pointed out, the jurisdiction of the justice as to the facts is conclusive.

Conviction sustained.

[COUNTY COURT OF YALE, BRITISH COLUMBIA.]

BEFORE HIS HONOUR, JOHN D. SWANSON, COUNTY JUDGE.

REX v. BRADY.

1. APPEAL (§ II C—50)—LOCALITY OF OFFENCE—MAGISTRATE ACTING FOR TWO COUNTIES—JURISDICTION OF COUNTY COURT ON APPEAL.

An appeal under the Summary Convictions Act, R.S.B.C. 1911, ch. 218, from a magistrate's conviction under a provincial law cannot be taken to the County Court of a county other than that in which the offence is alleged to have been committed, although the magistrate may have had jurisdiction in both counties.

[*R. v. Lynn* (No. 1), 17 Can. Cr. Cas. 354, 3 S.L.R. 339, referred to.]

2. VENUE (§ II B—20)—CRIMINAL PROSECUTIONS—NON-INDICTABLE OFFENCES
—PROVINCIAL LAW.

The general rule of the common law requiring the venue of trials of indictable offences to be laid in the county where the crime was committed, is to be applied also to trials of purely statutory offences otherwise than on indictment (as for example offences under a provincial liquor law), unless there is some statutory provision to the contrary.

[*R. v. West*, 4 Burr. 2507; *R. v. Harris*, 3 Burr. 1336, referred to.]

DECIDED: April 9, 1914.

‘ APPEAL from a summary conviction under the Liquor License Act, B.C.

R. L. Mailland, for the Crown.

A. D. Macintyre, for accused.

SWANSON, County Judge:—The accused was tried at Tete Jaune Cache in the County of Yale before W. A. Jowett, a Stipendiary Magistrate exercising jurisdiction in both the County of Cariboo and the County of Yale, on the charge of unlawfully selling liquor without a license, contrary to the provisions of the B.C. Liquor License Act. The accused was convicted and sentenced to six months' imprisonment. The accused appealed from said conviction to the County Court of Yale at Kamloops. Mr. Maitland raises the preliminary objection that there is no jurisdiction in the County Court of Yale to try the said appeal, the proper tribunal being the County Court of the County of Cariboo, being the County wherein the offence is alleged to have been committed. The objection is, I think, fatal to the appeal. The right to an appeal is given by section 72 of the Provincial Summary Convictions Act, R.S.B.C. 1911, Cap. 218, the defendant "may appeal to the County Court at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose."

Section 83 confirms this view:

Every justice before whom any person is summarily tried shall transmit the conviction or order to the Court to which the appeal is herein given, in and for the district, county or place where the offence is alleged to have been committed, etc.

It is interesting to note, by way of analogy only, the similar provisions in the Criminal Code, sec. 749 and sec. 757. [The

appeal is, of course, regulated entirely by the Provincial Act above named and not by the Code.]

Mr. Justice Lamont has dealt with the question of venue relative to trials in a Superior Court on indictment in *The King v. Lynn* (No. 1) (1910), 17 Can. Cr. Cas. 354, 3 S.L.R. 339, dealing with former section 557 of the Code, now sec. 577. The head-note [17 Can. Cr. Cas. 354] reads: "A charge or indictment is not to be preferred against an accused person outside of the judicial District or County in which the offence is alleged to have been committed unless an order of the Court has been made for a change of venue."

Lord Halsbury's Laws of England, vol. 9, par. 582:

The common law rule is that the proper venue for the trial of a crime is the area of jurisdiction in which the place is where the crime is committed. Statutory provision is made for the trial of certain crimes before Courts other than those within the area of whose jurisdiction such crimes were committed, but, in the absence of statutory provision, the common law governs the venue.

This principle as to the venue of trials of indictable offences is, I think, applicable to cases of trials of other offences triable otherwise than on indictment, unless there is some statutory provision to the contrary. In the case before me no reference is made to any statutory provision to change the common law principle. See also Archbold on Crim. Pleading and Practice, 24th Ed. 24, quoting Lord Mansfield in *R. v. West*, 4 Burr. 2507: "The old jurisdiction of counties was local: they were like different Kingdoms. There was no jurisdiction out of the County; no process out of it." Mr. Justice Dennison in *Rex v. Harris*, 3 Burr. 1336: "A place of trial ought not to be altered from that which is settled and established by the Common Law unless there shall appear a clear and plain reason for it, viz., that there cannot be there a fair and impartial trial." See also Encycl. of Laws of England, vol. 12, p. 450.

The appeal must therefore fail and the conviction stand.

Appeal dismissed.

[SUPREME COURT OF ALBERTA.]

BEFORE HARVEY, C.J., STUART AND SIMMONS, JJ.

REX v. NASH.

1. PERJURY (§ II B—50)—STATUTORY CORROBORATION—"MATERIAL PARTICULAR"—CR. CODE 1002—KNOWLEDGE OF FALSITY.

The corroboration required on a charge of perjury need only be as to the falsity of the previous deposition, although the circumstances may be such that to prove guilt a further element must be shewn such as the knowledge of the accused that the party with whom he claimed he had entered into a contract on behalf of another had in fact no authority to do so.

2. WITNESSES (§ III—58)—CORROBORATION—PRISONER'S TESTIMONY ON PERJURY CHARGE—INCONSISTENCIES WITH FORMER TESTIMONY.

Where the accused gives evidence on his own behalf in defence of a charge of perjury, material variances in such testimony from that in respect of which the charge is brought may in themselves supply the statutory corroboration which Cr. Code, sec. 1002, requires, namely, that the accused shall not be convicted "upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused."

[See also *R. v. Girvin*, 45 Can. S.C.R. 167; *R. v. Wakelyn*, 21 Can. Cr. Cas. 111, 10 D.L.R. 455; *R. v. Fraser*, 7 Cr. App. R. 99; *R. v. St. Pierre*, 19 Can. Cr. Cas. 82.]

DECIDED: June 30, 1914.

CROWN case reserved by His Honour Judge Crawford of the Edmonton District Court, on a conviction for perjury.

The conviction was affirmed, Stuart, J., dissenting.

E. B. Cogswell, for the Crown.

H. A. Mackie, for the prisoner.

HARVEY, C.J.:—The prisoner was convicted before Crawford, D.C.J., of having committed perjury by swearing to the effect that he and one Williams had a contract in March, 1914, with the Fort Saskatchewan Brick Yard Company for the delivery to them of five hundred tons of coal.

Certain points were reserved by him, one being as to whether there was corroborative evidence to satisfy the Code. At the close of the argument the appeal was dismissed. The only point upon which there was any doubt in the minds of any one of us was that of corroboration. On the criminal trial it appeared that the Brick Yard Company was the name under which a certain

man carried on business and he swore that there was no such contract as had been sworn to by the prisoner.

If the matter had rested there, there would perhaps have been no corroboration such as is required, though there were suspicious circumstances which had apparently some importance in the learned Judge's opinion.

However, the prisoner gave evidence, but did not repeat the evidence he had given before, but stated that the contract he referred to had been made with one Perrais, an employee of the Brick Yard Company.

It appears to me that this is entirely corroborative of the evidence of the proprietor, who swore that there had been no such contract, having also sworn that Perrais had no authority to make such a contract.

The prisoner might still not have been guilty, because he might not have known that Perrais had no authority. That, however, is not a matter upon which the corroboration is required, but merely the truth or falsity of the fact sworn to.

On this point, however, the suspicious circumstances were important; for the prisoner though he had known Perrais for some time and had seen him frequently, yet stated that he could not recall his name when in the former action he had sworn to the contract, but on the criminal trial he remembered his name, the fact being that at this time he was dead. The learned trial Judge seeing and hearing the prisoner give his evidence had a good opportunity of estimating what weight should be given to the circumstances referred to.

I am of the opinion, however, that on the evidence of the accused himself, qualifying, as it did, the sworn statement upon which the charge was based, there is the corroboration that is called for by the Code.

STUART, J. (dissenting):—For the reasons given at the hearing of the argument in this case, I think the answer to question one of the reserved case should be in the affirmative.

With respect to questions two and three, I had some doubt at the close of the argument, not having had, yet, an opportunity of reading all the evidence, as to what the proper answer should be. A more careful reading of the evidence has confirmed my

hesitation and I am now inclined to the view that these questions should be answered in the negative.

In the first place, it has to be observed that in giving his evidence on the trial of the civil action Nash was not cross-examined at all as to the terms of the verbal contract to which he referred. There is nothing at all to shew that if he had been so cross-examined and had been asked to tell what was said, he would have given any different account from that which he gave upon his defence at the trial of the criminal charge.

I am unable to assent to the view that because there are some doubts from a legal point of view as to whether the conversation to which he swore as having taken place between himself and Perrais would in law constitute a binding contract that, therefore, he should be convicted of perjury because he referred to it in general terms upon the trial of the civil action as a contract. An examination of the evidence of McLellan when he gave an account of the dealings between himself and Williams in the spring of 1912, will show that while he was careful to refuse to use the word "contract" in deciding his arrangement with Williams, he nevertheless did insist on calling it an "arrangement." Practically it was the same sort of arrangement that the accused stated he had made with Perrais, and I cannot assent to the view that a man should be convicted of perjury for describing an "arrangement" as a "contract." I cannot see anything of a corroborative nature within the meaning of the statute in these circumstances.

It is further said that the fact that he was unable to give the name of the man with whom he had made the arrangement when he was giving his evidence at the trial of the civil action should be treated as corroborative testimony implicating him in the charge of perjury, with respect to his assertion that there had been such a contract. Upon consideration I feel myself unable to treat this as corroborative within the meaning of the Code. It is altogether too slender a string. How often do all of us have the experience of knowing a man's face but forgetting his name? There is no more common experience. To refer to a particular case of my own: I remember that I had to do with the appointment of one of the professors of the Provincial University and that I examined his credentials, that I met him after his appointment time and time again, that I met him and his wife socially on many, many

occasions, that I had business dealings with him in respect of the administration of the university and I recall that very, very frequently I found myself embarrassed by the fact that it was absolutely impossible for me to speak his name and that I had to resort to subterfuges sometimes to avoid the embarrassment. Not only that, but in order to get over the difficulty I repeated his name to myself in his presence after I learned it again and over and over again, and notwithstanding that on the next succeeding occasion I could not possibly recall his name, although it was a very common English surname. In the case of this accused he was not given any length of time to think about the name and he was not recalled to ask if he could not remember the name. Then the fact that the man happened to die and he afterwards recalled the name is to my mind not a circumstance which should be treated as corroborative testimony implicating the accused in a charge of perjury.

As I intimated on the argument, I also do not think that the fact that he omitted to call witnesses to prove his alleged contract, who could have supported his testimony if it were true, is any circumstance of a corroborative nature. He probably should have been better advised by his counsel in preparing his case and should have been told that it would be very advisable for him to call the men or the man with whom he had made the contract, but that was the fault rather of his counsel, it seems to me, in the preparation of the case.

Finally it is suggested that he gave a different account of the date on which he made the contract at the trial of the civil action from that which he gave upon his defence. A careful examination of the evidence will, I think, show that this point is obscure. It is true he said in answer to a question which did not refer to the alleged contract at all, but to the subletting of the mine to some one else, "No, I got a contract along late in the winter," but it does not appear to me to be by any means certain that he was, in the use of those words, referring to the contract for the sale of coal. It must be remembered how this man was making his money out of this mine. He was subletting it and getting a royalty from his sublettee of 50 cents a ton and it was to his interest that as much as possible should be sold by the sublettee and therefore to his interest to secure purchasers for the output.

He was therefore interested in two sorts of contract, first, a contract with the man working the mine, and, secondly, with people purchasing the output.

Now, the question which was directed to him which he answered in the words I have quoted, referred to a sublease and an examination of the rest of the evidence shows that he had, according to his statement, and he is not contradicted anywhere else, got a contract with one Clarke just before this for subletting the mine for the coming summer and from this man he was to get the royalty which he expected. In the answer which I have quoted he was answering a question about a sublease and it is not by any means clear to my mind that the answer referred to the contract for coal. It may be said that the following questions suggest that that was what he was thinking of, but under the whole circumstances there seems to me to be too much opportunity for misunderstanding between the counsel who was examining and the witness being examined as to what they were talking about to justify any necessary inference that he was then saying that he had got a contract for the sale of the output "along late in the winter." In order to furnish corroborative evidence within the meaning of the statute, I think the contradictory statement suggested against him should be free from obscurity; and that I do not think it is.

There being no other corroborative testimony suggested, I think the conviction should be quashed.

SIMMONS, J., concurred with HARVEY, C.J.

Conviction affirmed.

[COURT OF SESSIONS OF THE PEACE, QUEBEC CITY.]

BEFORE THE HONOURABLE CHARLES LANGELIER, J.S.P.

REX v. LANGLOIS.

1. GAMING (§ I—6)—AUTOMATIC GUM-VENDING MACHINE—FREE CHECKS WITH PURCHASES—INDUCEMENT TO RE-PLAY EACH CHECK FOR MORE CHECKS OR BLANK—WHETHER GAMING ESTABLISHED.

To constitute gaming the result must be uncertain, and a charge of gaming is not established where a slot machine from which chewing gum is sold automatically at the ordinary cost of five cents per packet distributes in addition free checks varying in number with each sale but indicated to the customer before he deposits his coin, although these checks are redeemable elsewhere for goods or may, at the customer's option, be re-played in a section of the machine on the chance of more checks or a blank.

[*R. v. Fortier*, 17 Can. Cr. Cas. 423, applied.]

DECIDED: May 22, 1914.

HEARING on a preliminary inquiry upon a charge of gaming brought under Cr. Code, secs. 226 and 228, in respect of the operation of an automatic vending machine for chewing gum in connection with the distribution of a varying number of "trade checks," redeemable for goods at a particular store and available for re-operating the vending machine on the chance of more checks or a blank, but which could not be used to obtain gum from the machine.

The charge was dismissed on the preliminary inquiry, on a finding that the facts disclosed no case to go to the grand jury.

A. Lachance, K.C., for the Crown.

L. A. Taschereau, K.C., for the accused.

JUDGE LANGELIER: The defendant is prosecuted for having kept in this city a gaming house, contrary to secs. 226 and 228 of the Criminal Code, in having in his possession the machine, "O.K. Gum Vendor." This machine is automatic, and is put in motion by a lever after the coin has been deposited. No trick is possible.

A few witnesses were heard by the Crown to establish that it was a gambling machine. Detective Jos. Tindel swore that he deposited successively twenty American coins of five cents,

with the following result: the five first coins gave him each time a pack of gum; the sixth a pack of gum and four checks; the seventh a pack of gum; the eighth a pack of gum and two checks, and so on till he reached the twentieth, where he received a pack of gum and four checks.

These checks, of the value of five cents each, are good to buy merchandise in the tobacco store, the only place where they may be found. The checks may also be played in the machine instead of the American coin. He used them for that purpose, with the following result: with the first four he received nothing; with the fifth two checks; with the sixth nothing; with the seventh twenty checks; with the eighth two checks; with the ninth nothing; and with the tenth two checks. So he received twenty checks in exchange of the ten he had deposited in the machine.

I must say that when the machine is set in motion with a check instead of a coin, the pointer also indicates what you are to receive, but it is only checks or nothing—no gum at all.

The witness swore that the player always knows beforehand what he is to receive.

The same experience was made by Detective Juste Masse, with the same result, though with less profit than Tindel, but still with profit.

Witnesses Edouard Tourgeray and Edouard Derners stated that there was neither hazard nor chance in the operation of the machine.

The agent for the sale of the machine, G. J. Leblanc, was heard for the defence, and swore that they are only placed in tobacconists' shops and never in the bars; that the gum costs them wholesale $2\frac{1}{2}$ cents a packet and that the only profit which is realized by the company is upon the sale of the gum, which is sold at five cents a packet, which profits are divided half and half with the tobacconist.

Now, let us see what constitutes gaming. Here is the definition given by Bishop's On Statutory Crimes, par. 861:—

Gaming defined.—While it is not possible that any definition of a word so flexible in meaning as this should be universally correct, still, in most circumstances and under most statutes gaming is any sport or play carried on between two or more persons, depending on *skill, chance, or the transpiring of an unknown future event*, on the result of which some valuable thing is

without *other consideration* to be transferred from the one to the other, or which in his course or consequence involves some other thing demoralizing or unlawful.

Cyc., vol. 20, p. 921, gives about the same definition:—

Gambling, according to the common use and understanding of that word, is a generic term, and includes within its meaning every act, game and contrivance by which one intentionally exposes money or other things of value to the risk or hazard of loss by chance.

If we bring together the above definitions with our sec. 226, we see that gambling, to come under the law, must be a game of hazard or skill mixed with hazard, and of which the winning result must depend upon a *future and uncertain event*. It is also the interpretation given by our Court of Appeal in the case of *Rex v. Fortier*, 17 Can. Cr. Cas. 423, where Judge Würtele said:—

A game of chance is one in which hazard entirely predominates; and a mixed game of chance and skill is one in which the element of hazard prevails notwithstanding the skill of the gamblers.

In Ontario, Mr. Justice Rose, in the case of *The Queen v. Jamieson*, 7 Ont. R. 153, has also given a definition of a game of chance:—

The throw of the dice, the turning of the wheel, the shuffling of the cards, are all modes of chance. No mental process, no mode of calculation, no estimate will enable us to arrive at the result. *The result is not certain, definite, ascertainable fact by any controllable method*. It is uncertain, doubtful. No human mind knows or can know what it will be until the dice are thrown, the wheel stops its revolutions, or the dealer has thrown out the cards.

From all those authorities it will be seen that it is necessary, to constitute gambling, that the result be uncertain, indefinite or doubtful. Have we those elements in the present case?

The evidence adduced by the Crown was to the effect that each time the machine was set in motion by the lever it always gave a pack of gum of the value of five cents, and often accompanied with checks, varying from one to twenty, which checks represent themselves a value of five cents each. The player knows beforehand what the result will be, and what he is to receive is indicated by the pointer on the cylinder. There is in that nothing indefinite, nothing uncertain, nothing left to

hazard. And, by what has been proved, the chances are equal between the player and the tobacconist.

But the Crown has contended that when the machine is set in motion with a check, no gum comes out, only checks and sometimes nothing at all, and that there exists a certain hazard. We must not forget that the checks have cost nothing to the player; he may do what he likes with them: buy tobacco or keep them or throw them away. If he puts them in the machine, witness Masse has stated that, in that case, the chances were again even.

Who will pretend that such a thing is what the law has qualified as gambling? I do not believe so. The player can not lose more than the profits he has realized; when he has exhausted his checks, if he wishes to continue to play, he must start again with the American coins, for which he receives packs of gum. Consequently, the player might play day and night without being at a loss.

Witness Leblanc, for the defence, has explained the whole scheme: the only profits which are obtained come from the sale of the gum, and are divided half and half between the company and the tobacconist. Gambling is in no way the source of profits.

All those circumstances go to shew that the machine is not used for a game prohibited by the law. To justify the law to interfere, there must be an evident fraud, a game of hazard or chance, which does not exist here.

Harris on Criminal Law, 123, says:—

The law does not deem it within its province to punish such practices as gaming, unless either some fraud is resorted to, or regular institutions are established for the purpose, or play is carried on in a public place so as to amount to a public nuisance.

I find the same doctrine expressed by the late Judge Burbridge in his work, Digest of Criminal Law, p. 175:—

Unlawful gaming means gaming carried on in such a manner or for such a length of time or for such stakes (regard being had to the circumstances of the players) that it is likely to be injurious to the morals of those who game.

Decidedly, no one will pretend that there is great harm in entering in a tobacconist's shop and there to play a few coins of five cents, with the assurance to receive even value for the same. The profits the players are to receive are not so big as

to be of a nature to inflame them with the passion of gambling and to induce them to play very long. It is only a passing amusement, absolutely inoffensive, both for society and the player.

Another feature in favour of that machine is the fact it is never placed in the bars, where the players might be induced to use their profits in drinks and "demoralize themselves," as Bishop says in his definition of gambling. It is only put in tobacco stores, and the checks are only good for buying merchandise sold in such establishments.

For all these reasons I declare there is no case for the grand jury, and the complaint is dismissed.

Charge dismissed.

[HALIFAX COUNTY COURT, NOVA SCOTIA.]

BEFORE HIS HONOUR W. B. WALLACE, COUNTY JUDGE.

REX v. VERDI.

1. INTOXICATING LIQUORS (§ III E—78)—SALES TO PROHIBITED PERSONS—INDIAN ACT (CAN.).

The provisions of the Indian Act (Can.) as to selling intoxicants to Indians will apply to make it an offence to sell to a half-breed if he is a recognized member of an Indian tribe and votes at tribal elections, although he has abandoned the Indian mode of life and draws no government bounties as an Indian.

2. INTOXICATING LIQUORS (§ III C—65)—SALE BY EMPLOYEE OF LICENSE HOLDER TO PERSON OF PROHIBITED CLASS—CRIMINAL LIABILITY OF EMPLOYER.

A hotel keeper holding a liquor license is liable to conviction under the Indian Act (Can.) for unlawful sales of liquor made to Indians by his employees within the general scope of their employment although he had expressly forbidden his employees to sell to Indians.

3. SUMMARY CONVICTIONS (§ V—51)—ENFORCEMENT OF FINE—COSTS OF COMMITMENT—INDIAN ACT (CAN.).

A summary conviction for illegally selling intoxicants to an Indian in contravention of the Indian Act (Can.) may, under Cr. Code, sec. 739, properly adjudge costs of commitment and conveying to gaol in default of payment of the fine.

ARGUED: May 28, 1914.

DECIDED: June 5, 1914.

APPEAL from a summary conviction. The defendant was convicted by the Stipendiary Magistrate of the city of Halifax of a

violation of section 135 of the Indian Act and fined \$50 and costs. He appealed to the County Court sitting in term. On the hearing of the appeal the depositions taken below were used in lieu of recalling witnesses used below. The evidence of Lambkin, the person to whom the liquor was sold, in relation to his being an Indian, was as follows:

I was brought up in New Brunswick on an Indian Reserve. There till seven years old, and I left there and went travelling for a living. I have been in Nova Scotia about 18 years. I never lived on an Indian Reserve since marriage about ten years ago. I lived amongst Indians in Nova Scotia. Before marriage I occasionally in Nova Scotia lived in Nova Scotia on an Indian Reserve for short times.

Kinsac where I live is not an Indian Reserve. I live there like a white man. I never got bounties. I never draw any for self or any one dependent on me.

W. J. O'Hearn, for the defendant, appellant.

The evidence shows that Lambkin has abandoned the Indian mode of life and is living as an ordinary white citizen, paying municipal taxes, etc. Such a person is not an Indian within the provisions of the Act. See sec. 2 (*d*), (*b*) and (*i*) of cap. 81, R.S.C., also *R. v. Duquette*, 9 P.R. 29.

J. L. McKinnon, for the Dominion Government and the prosecutor: The evidence shows Lambkin voted at the election for Chief. This raises a presumption that he is still a member of the Micmas tribe. Sec. 113 provides for his obtaining right of citizenship.

O'Hearn, in reply: Sec. 113 only applies to an application for allotment of land.

HALIFAX, N.S., June 5, 1914.

JUDGE WALLACE:—This is an appeal from a conviction under section 135 of the Indian Act for selling intoxicants to an Indian.

The first objection urged by counsel for defendant is that the facts do not establish a sale. But, although there is conflicting evidence, I find that a sale took place.

The second objection urged is that the alleged purchaser is not an "Indian" within the meaning of the statute, as he did not live on an Indian reservation, and received no bounty and was not a ward of the government. There is some evidence that he was a half-breed, his father being French, and his mother a squaw, and there is also some evidence that, though he was brought up

on an Indian reservation, he had been absent from it for years and was farming.

But to be within the terms of the statute it is not necessary that the person should be of full Indian blood. The fact that one parent was French and the other parent Indian would not, of itself, exclude this man from the provisions of the Indian Act. This beneficial legislation is not confined to Indians on reservations, but is also intended by the comprehensive terms of the first clause of section 135 to protect many others of a race peculiarly susceptible to the demoralizing abuse of intoxicants. This man was called as a witness for the defence and testified that he had belonged to the Micmac tribe but left it last spring. He admitted, however, that he voted last August at the election of a chief. By section 166 of the Indian Act, male members of a band have the right to vote at such elections. The fact that this man voted last summer and did not since resign from the tribe, together with the other facts in evidence, satisfy me that he is an "Indian."

A third objection is urged that the license holder had issued instructions to his employees not to sell to Indians, and that any employee who so sold was acting contrary to his instructions. I find that the license-holder did give such instructions and that they were given in good faith. But that fact does not constitute a defence. A sale of intoxicants to an Indian is an act which, in the public interest, is absolutely prohibited by this statute. It would therefore be contrary to the public interest if a license-holder could rid himself of his liability by giving general instructions to his servants not to sell to Indians. The object of the statute could thus be defeated. His business is carried on to a considerable extent by others on his behalf, and he must be held responsible for any act done by his employe within the general scope of his employment. Where Parliament absolutely forbids the selling to a class, an employer must, at his peril, see that the law is not violated by his employees. It is not sufficient to give instructions; it is his duty to see that his orders are obeyed. Sometimes such instructions might be treated as a colourable, perfunctory prohibition and the servant might assume that the employer would shut his eyes to unlawful zeal displayed for his benefit. The employer must prevent that which the statute

prohibits. If there existed any doubt on this question, the wording of the first line of section 135 should dispel all doubt.

Finally, it is contended that the conviction is invalid because it adjudges costs of commitment and conveying to jail in default of payment of the fine of \$50, and costs of prosecution. But the conviction is in conformity with section 739, sub-sec. (b), and therefore valid.

The conviction is confirmed and the appeal dismissed.

Conviction affirmed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE SIR CHARLES TOWNSHEND, C.J., GRAHAM, E.J., AND
RUSSELL AND LONGLEY, JJ.

REX v. COOK.

1. TRIAL (§ I D—17)—CRIMINAL CASE—COUNSEL FOR DEFENCE—STATING
OR READING THE LAW TO THE JURY.

The right of the prisoner's counsel at the close of the testimony on a criminal trial is to "sum up the evidence" (Cr. Code, sec. 944), and it is in the judge's discretion whether counsel will be permitted in his address to the jury to read to them extracts from legal text-books or law reports, even though the extract sought to be used may be of an English judicial opinion of accepted authority.

2. COURTS (§ II B—180)—TERMS AND SESSIONS—POWER TO CHANGE DATES
AS TO CRIMINAL COURTS—CONSTITUTION AND ORGANIZATION OF
COURT.

Section 27 of the Nova Scotia Judicature Act, R.S.N.S. 1900, ch. 155, is not *ultra vires* of the Nova Scotia legislature in respect of the change it purports to make in the times at which fixed sessions of certain provincial courts of criminal jurisdiction are to take place.

DECIDED: April 24, 1914.

THE prisoner was indicted for the murder of Charles Asaff by the grand jury, at the March sittings of the Supreme Court at Halifax, and was tried before Ritchie, J., and a petit jury at said sittings. The jury returned a verdict of guilty.

While counsel for the prisoner was addressing the jury, he attempted to refer to reported cases on circumstantial evidence, and particularly to the charge of Baron Alderson to the jury in *Rex v. Hodges*, 2 Lewin's C.C. 228. This the learned Judge declined to allow him to do.

After the jury retired to consider the evidence, counsel for

the prisoner requested the learned Judge to recall them and further charge them that they must not only find the evidence consistent with the prisoner's guilt, but they must also be satisfied that the evidence was inconsistent with any other explanation, theory or hypothesis. This he also declined to do.

Counsel for the prisoner further requested the learned Judge to recall the jury and charge them that the possession of the identified stolen property by the accused was not sufficient for the purposes of conviction uncorroborated by other evidence. This he also declined to do.

There was an application to the learned Judge to reserve for the opinion of the Supreme Court en banc, sitting as a Court for Crown Cases Reserved, the following questions:

1. In addition to the matters on which I did charge, should I have directed the jury that, besides being satisfied that the facts proved were consistent with the prisoner's guilt, they must also be satisfied that said facts were inconsistent with any other explanation, theory or hypothesis.

2. Should I have directed the jury that the possession of identified property of deceased by the prisoner was not sufficient for the purposes of conviction without other evidence?

3. Was I right in stopping counsel for the prisoner and preventing him from referring to reported cases on circumstantial evidence and the charge of Baron Alderson in his address to the jury?

4. Did I misdirect the jury by failing to leave to them the issue whether the deceased Asaff was killed deliberately or accidentally?

5. In further charging the jury on a question asked by a juror as to what evidence existed as to the deceased Asaff being at the prisoner's house, should I, in addition to what I stated, have gone further and told them that if they regarded the prisoner's statement as to the possession of the money order correct, then he had met part of the Crown's case?

6. Is sec. 27, ch. 155, R.S.N.S. 1900, *ultra vires* the legislature of Nova Scotia?

7. Should the conviction be quashed or a new trial ordered?

The learned Judge dismissed the application, and, in doing so, gave judgment as follows:—

RITCHIE, J.:—As to question 1, the direction asked for is a proper one, except that I think the word "reasonable" or "rational" should have been added before the word "explanation." With the addition of the word "rational," the direction asked for would have been substantially the direction of Baron Alderson in *R. v. Hodges*, 2 Lewin C.C. 228. That learned Judge told the jury that, before they could find the prisoner guilty,

they must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."

It is, of course, not contended that I was bound to use any particular form of words in charging the jury on this point. I told the jury, as will appear from the charge, that each of the facts relied upon as evidence must be proved beyond a reasonable doubt, and that if the facts were so proved, then, if the inference from such facts was an irresistible one, they should find him guilty; otherwise, not guilty.

At the conclusion of the charge, I again reminded the jury that the prisoner must be acquitted if they were not convinced beyond a reasonable doubt. On this point I am strongly of opinion that there was no error so far as the prisoner is concerned. I am not sure that I did not put the matter too strongly against the Crown.

As to the second question, I am quite clear that I was not called upon to make the direction asked for. I left the whole case to the jury in the most unqualified manner. It was for the jury to draw such inference as they thought proper from the possession by Cook of the dead man's property, and it was also for the jury to draw such inference as they thought proper from the false and contradictory accounts which he gave in order to account for the possession of the property.

As to the third question, the law of a case is for the Court and for the Court alone. It is, therefore, clearly within the province of the Judge to stop counsel when he is reading law to the jury.

As to the fourth question, in my opinion there was no misdirection. I stated to the jury my view that the case was that of murder by someone, but I very distinctly told them that they were to act upon their own view of the facts and not mine. I quite agree that the learned Judge should put the case for the prisoner to the jury as carefully as the case for the prosecution, but, if the prisoner calls no evidence and the case for the Crown discloses no satisfactory evidence for the prisoner on a particular point, the Judge cannot put what is not there. I do not think

there was any evidence upon which a jury could reasonably have come to the conclusion that death in this case was accidental. Holding this view, it was more in the interest of the defence that I should not refer specifically to it, because, if I had done so, I would have told them what I thought about it.

However, it was really put to the jury, because Mr. O'Hearn put it to them, and I said to the jury:—

You heard the arguments which Mr. O'Hearn put before you. You will give to them just as much careful consideration as you give to the argument of the counsel for the Crown. You will consider them with as much carefulness. I think perhaps a jury would be inclined to consider them perhaps even more carefully. This man is entitled to a fair, impartial trial; give to those arguments your best consideration.

As to question 5, the jury asked a question of fact, to which I replied. It is urged that I should have re-charged the jury on the subject matter of the question. I think not. Apart from this, of course it was too obvious for comment that, if the jury believed the prisoner's statement as to the possession of the money order, that part of the Crown's case was fully met, and this question was left to them.

As to question 6, the fixing of the date of the terms of the Court is part of the constitution and organization of a provincial Court, and, therefore, sec. 27 of ch. 155, Revised Statutes of Nova Scotia, 1900, is not *ultra vires*.

I have no doubt as to any of the questions raised, and, therefore, refuse to reserve a case as to any of them.

The Court en banc.

The prisoner now moved the Court of Appeal for leave to appeal following the refusal to reserve a case.

The material portions of the evidence and of the charge to the jury are set out in the opinion of Graham, E.J.

W. J. O'Hearn and James Terrell, for the prisoner.

Stuart Jenks, K.C., Deputy Attorney-General, and *A. G. Morrison*, K.C., for the Crown.

TOWNSHEND, C.J.:—I had not intended to put in writing my reasons for dismissing this appeal, but, in case it should go further, I desire to say that I am in complete agreement with the trial Judge, who refused a reserved case. There is, in my

opinion, nothing in any of the grounds put forward demanding the serious consideration of this Court.

I shall only refer to one of the grounds, the third, because it seemed to make some impression on one of the members of the Court as to the right of counsel to read to the jury legal works or reports on trials in cases of homicide. I do not doubt the learned trial Judge was perfectly correct in interfering with the counsel for prisoner. I hold that he had no such right, and that in all such matters, how far any comments on the law of the case, especially reading from legal works, is entirely in the Judge's discretion. Some American cases were cited for counsel for prisoner in support of his right. I should regret very much to see this Court follow or be influenced in any way by the course of procedure in American criminal trials, for, high as many of the Judges stand, no one deprecates more severely than many of the same Judges and eminent members of their bar the frequently gross failure of justice in administering the criminal law resulting from their course of procedure.

Our Code, however, I think disposes of the question, if there be any question, by providing that the prisoner's counsel, at the close, may address the jury on the evidence (sec. 944): "When all the evidence is concluded, to sum up the evidence." This right has only been allowed by statute in comparatively modern times, and cannot be extended as claimed here apart from the statute. It would be highly inconvenient and calculated to mislead the jury if counsel on each side had the right to read from books the law as laid down in other cases, where the facts and issues were not the same. It would not be possible for untrained laymen to understand all those nice distinctions which are present in most cases. On the Judge, and on him alone, lies the responsibility for directing the jury in point of law, and, if he goes wrong, he can always be corrected. If the jury must take the law from him, what good can come from counsel reading and interpreting the law in any other way? It can have but one result, if it is of any weight—that would be to confuse the minds of the jury, and, therefore, should not be permitted.

But if there should be any doubt in the matter, I apprehend that counsel must go further than here, and convince the Courts that the prisoner has suffered or has been prejudiced by the refusal. I refer to the general clause in the Code, sec. 1019:—

"No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted, or rejected, or that something not according to law was done at the trial or some misdirection given, or unless, in the opinion of the Court of appeal, some substantial wrong or miscarriage was thereby occasioned in the trial."

Here nothing of the kind has been shown or even pretended.

GRAHAM, E.J.:—The jury has convicted the defendant of the crime of murder, and he has applied to the learned trial Judge to reserve a case for the full Court upon several points, which the learned Judge has refused to do. That has brought the defendant to the full Court, by way of appeal under the Criminal Code, to require the learned Judge to state a case for the full Court.

The evidence against the defendant was wholly circumstantial evidence. The body of Asaff, the pedler, who was shot, was found about a month after the shooting, or, rather, after he had been missed, off Cook's Road, at Sheet Harbour, sixty-six feet distant from the road. It was covered with bushes. It was not far—703 feet—from the house in which the defendant, a youth, lived with his uncle and aunt. He had been shot from behind with a rifle bullet, through the head, and, while there was a small amount in change on his person, his money was gone.

Previously to the finding of the body, the defendant had been attempting to get a Post Office order for \$15 cashed at the post office, and this Post Office order is in evidence. And the deceased is proved to have had this Post Office order in his possession, having cashed it for the payee. The wallet in which the deceased pedler had been seen to place that Post Office order was not found on the person of the defendant when he was arrested. A wallet which was found on his person is identified as the wallet of the deceased.

Then the defendant had told untruths about how he came to be in possession of the Post Office order when he was attempting to get it cashed.

There was, after the alleged shooting, some spending of money at Truro, which was in excess of the usual means of the defendant.

The defendant's counsel apparently relied upon the inconclusiveness of the proof that the greater offence of killing had been committed by the defendant, and presented other theories as to how the defendant might have become possessed of the wallet, Post Office order and money, as taking it from the dead body (that has happened in one reported case), or receiving it from the person who did kill the pedler.

The learned Judge refused to allow the counsel for the defendant, in the course of his address, to read to the jury Alderson, B.'s, opinion in the case of *R. v. Hodges*, 2 Lewin C.C. 228, as follows:—

Alderson, B., told the jury that the case was made up of circumstances entirely, and that, before they could find the prisoner guilty, they must be satisfied, not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.

It was never contended that this was an incorrect statement of the law, or that it was not relevant to the facts in this case and very much in point. Neither was it the fact that in this case the Judge had already made a ruling at variance with it or a ruling in the same sense.

Then the learned counsel, at the close of the Judge's summing up (after the jury had retired), apparently thinking that the equivalent or sense of this passage quoted from Alderson, B., had not been put before the jury, requested the Judge in the following terms. I copy the stenographer's note:—

After the jury retired, Mr. *O'Hearn* asked the Court to instruct the jury that, besides being satisfied that the facts were consistent with the prisoner's guilt, they must also be satisfied that they were incapable of any other explanation or hypothesis. The Court declined to call the jury for this instruction.

I shall deal presently with what the learned Judge had told the jury. The passage from Alderson, B., has passed into almost invariable use, and it now constitutes one of the rules of evidence: 1 Taylor on Evidence, sec. 69.

In Wills on Circumstantial Evidence, 262, we have:—

Rule 4.—In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

The author adds:—

This is the fundamental rule, the *experimentum crucis* by which the relevancy and effect of circumstantial evidence must be estimated. . . .

Later, in referring to what Lord Chief Baron MacDonald had said in *Patch's* case:—

That the nature of circumstantial evidence was this, that the jury must be satisfied that there is no rational mode of accounting for the circumstances but upon the supposition that the prisoner is guilty.

The author adds:—

Mr. Baron Alderson, with more complete exactness, said that, to enable the jury to bring in a verdict of guilty, it was necessary not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw.

Later the author states:—

Rule 5.—If there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted. . . .

He continues later:—

In questions of civil right, the tribunal will often decide according to the greatest amount of probability in favour of one or the other of the litigant parties, but, where life or liberty are in the balance, it is neither just nor necessary that the accused should be convicted but upon conclusive evidence.

Then he cited what Lord Justice Clerk Cockburn told the jury in *Madelein Smith's* case:—

I wish you to keep in mind that, although you may not be satisfied with any of the theories that have been propounded on behalf of the prisoner, still, nevertheless, the case for the prosecution may be radically indefective in evidence.

I think that there was no valid objection to the learned counsel stating the passage in question to the jury. I refer to a case in which counsel for the prosecution was doing this same thing before Tindal, C.J., and Baron Parke, and, on objection, it was permitted. *Regina v. Courvosier*, 9 C. & P. 362 at p. 363, in which Mr. Adolphus (who was, for the Crown, prosecuting the prisoner for murder), was proceeding to read the observations of Lord Chief Baron MacDonald, who tried the case (of a man named Patch, see Wills on Evidence, p. 390), upon "the nature and effect of circumstantial evidence." Phillips, for the

prisoner, objected "to his reading to the jury the observations of a Judge in a particular case tried many years before."

Tindal, C.J.: "He has the right to use them as his own opinions; there is no objection to his using them as part of his own speech."

It is true this case was before Denman's Act, but counsel, in summing up the evidence, cannot very well make an argument to the jury in some cases if he is not allowed to state the principle within which he is trying to bring the evidence. If it could be done in the case of the prosecutor, it could be done in the case of the defendant.

But the answer to this contention, and also to the contention that the learned Judge should have put this rule before the jury is, that the prisoner has not been prejudiced if something to the same effect, the sense of that, has been put before the jury.

The learned Judge, at the outset, after dealing with their duty to the Crown, said:—

Your duty, on the other hand, to this man is to give an absolutely fair and impartial trial, and if, after careful and conscientious consideration of the whole evidence, you have a reasonable doubt as to his guilt, then your absolute duty to him is to give him the benefit of that doubt and acquit him.

Gentlemen,—The first thing that occurs in this connection is, what is a reasonable doubt? I say to you that it does not mean the mere possibility of a doubt. It has been defined by a very able Judge, Chief Justice Shaw, of Massachusetts, in the case of *The Commonwealth v. Webster*, and I am going to read it to you and adopt the words of that learned Judge as my own in giving you a definition as to what is meant when a Judge talks to a jury about the reasonable doubt which a person is entitled to.

"Then what is a reasonable doubt? It is a term often used—probably pretty well understood but not easily defined. It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favour of innocence; and every person is presumed to be innocent until he is proved guilty. If, upon proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of it by acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral

certainly, a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt, because, if the law which most depends upon considerations of a moral nature, should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether."

You have here it laid down, and, I think, after giving it a good deal of consideration, correctly laid down, that what is meant is that you must have that certainty that directs and convinces your understanding and satisfies your reason and judgment, although that may not be *an absolute certainty*. If you are reasonably satisfied, if your reason and judgment are satisfied beyond a reasonable doubt, explained as I have explained it to you, if you are so satisfied, you will find this man guilty, and, if you are not so satisfied, as I have said, it is your bounden duty to act on the convictions produced by the evidence.

Later the learned Judge said:—

Now, there are two kinds of evidence, direct and circumstantial evidence. Direct evidence, as you no doubt know, is where, for instance, a man sees another fire a gun and kill somebody and comes and swears to it—that is direct or positive evidence. Circumstantial evidence is where there is not direct evidence as to the fact to be proved, but a series of other facts are established by evidence which are so associated with the fact in question that they lead to a satisfactory and reasonable conclusion.

Again, I think I cannot do better than quote again from the judgment of Chief Justice Shaw in this case:—

"The distinction, then, between direct and circumstantial is this: Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial. That is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or the force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death and, of course, there is nobody that can be called to testify to it. Is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case—that is, that a body of facts may be proved, of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns. It would be most injudicious to the best interests of society if such proof could not avail in judicial proceedings. If it was necessary always to have positive evidence, how many criminal acts in the community, destructive to its peace and subversive of its order and security, would go wholly undetected and punished?

The necessity, therefore, of resorting to circumstantial evidence, if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes and about the execution of criminal acts, seek the security of secretness and darkness. It is, therefore, necessary to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions, and, thanks to a beneficent providence, the laws.

of nature and the relation of things to each other are so linked and combined together that a medium of proof is often thereby furnished, leading to inferences and conclusions as strong as those arising from direct testimony.

Later, in dealing with the facts of the case, he said:—

Three different stories—got it from the pedler, the old man, his uncle, got it from Murphy for working for him, then he got it from Murphy himself. Of course, he lied about it. But you don't punish him for that. You don't find him guilty because he is a liar, but you say to yourselves, from the conduct of this man, from the different stories he has told as to the possession of the Post Office order, are we irresistibly drawn to the conclusion that he murdered this man? That is for you. Of course, if he had given any reasonable explanation about it, that would have disposed of it. If he had stuck to his story that he got it in change, and if he had called his aunt and his uncle to produce the goods that he bought from the pedler, there would have been an explanation. It is for you to say what inference you draw from it.

From that it might be implied that, unless they were irresistibly drawn to the conclusion that the defendant murdered the man (though the use of the word "irresistibly" was hardly accurate), they were to acquit.

In respect to the quotation from the summing-up of Chief Justice Shaw's amplification upon reasonable doubt, Wigmore, in his work on Evidence, sec. 2497, says:—

Then, in Mr. Starkie's classical treatise, "Moral certainty to the exclusion of all reasonable doubt is given vogue. From time to time various ill-advised efforts have been made to define more in detail this elusive and indefinable state of mind. One that has received frequent sanction and has been quoted innumerable times is that of Chief Justice Shaw, of Massachusetts, on the trial of Dr. Webster.

And he gives the quotation:—

"Nevertheless, when anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is rather confusion or at least continued incomprehension. . . . The effort to perpetuate and develop these unserviceable definitions is a useless one, and seems to-day chiefly to aid the purpose of the tactician. It should be wholly abandoned.

In *Reg. v. White*, 4 F. & F. 383, there is a note containing a criticism of the dictum, and characterizing it as a "dangerous doctrine" that "jurors might convict prisoners upon such an amount of proof as they would act upon in any of the affairs of life, in which it is notorious men daily act, and necessarily

act, without any proof at all." And in respect to something said by Pollock, C.J., to the jury in *Rex v. Manners*, 7 C. & P. 801, namely:—"You are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life, etc." The note adds: "No case was cited and no such dictum can be found in the books."

Something to that effect is contained in the passage from Shaw, C.J., uttered in 1850, though not mentioned in this note.

However, I think that within the four corners of the passages from Shaw, C.J., and the comments of the learned Judge in this case, there is involved all that was enunciated in the rule laid down by Alderson, B., although, perhaps, it is not stated so fitly for practical use by a jury.

If there is proof to a moral certainty, and beyond reasonable doubt, this is involved that it must be proof which precludes every other rational hypothesis than that of his guilt. All that the jury in this particular case had to be satisfied of, in order to convict the defendant, was that he and no one else killed the pedler. Was a theory that someone else did it a reasonable one? If they had any reasonable doubt about it, they should acquit. And I think that must be included in the passages from Chief Justice Shaw, although that was a more complicated case and required more statements.

In *Commonwealth v. Costley*, 118 Mass. 24, Gray, C.J., says:—

Proof beyond a reasonable doubt is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof to a moral certainty, as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent—each has been used by eminent Judges to explain the other, and each signifies such proof as satisfied the judgment and consciences of the jury as reasonable men and applying their reason to the evidence before them *that the crime charged has been committed by the defendant*, and so satisfies them as to leave no other reasonable conclusion possible.

In *State v. Overson*, 8 A. & Eng. Annotated Cases, p. 796 (n), this general rule is given:—

It has long been the law in some jurisdictions that to justify a conviction on circumstantial evidence alone, the facts relied upon must be absolutely incapable of explanation upon any other reasonable hypothesis than that of guilt.

I think that agrees with *R. v. Hodges*, 2 Lewin C.C. 228:—

Since this is the law a jury called to pass upon a case wherein the evidence is wholly circumstantial should be informed of the rule as a part of the law of the case. The ordinary charge upon the law of reasonable doubt is considered to be ineffectual to convey to the minds of the jury a clear conception of this exaction of the law when a conviction is sought upon circumstantial evidence alone.

But I think the concluding sentence is at variance with what I have quoted from Gray, C.J., and I think that the passages quoted from Shaw, C.J., while dealing with the law of reasonable doubt, really also deal with it as a case of circumstantial evidence, and, therefore, were sufficient.

I think that there is not sufficient ground for requiring a case to be stated for further argument.

The other points raised at the hearing did not suggest anything which required a case.

The appeal must, therefore, be dismissed.

RUSSELL, J.:—This is an appeal from the refusal of the trial Judge to reserve a case after the conviction of the defendant for the murder of Charles Asaff.

One of the grounds for appeal is that the learned trial Judge did not permit counsel for the prisoner to read from the reported charge of the trial Judge in *Rex v. Hodges*, 2 Lewin C.C. 228.

No doubt the charge was an excellent one, but it must, I think, be in the discretion of the trial Judge to determine to what extent, if any, he will permit counsel to go in presenting to the jury the principles of law by which the case is to be determined. In some cases—perhaps in many cases—the facts cannot be adequately explained to a jury without so far explaining the law as to enable the jury to appreciate the relation between the facts and the legal principles which are involved in the issue. I do not think that any Judge would ever prevent such a statement, and, if such a case should occur, I would not care to say that it might not be such an error as would warrant a new trial of the cause. But no such case is here presented. Cases were cited at the argument in which legal authorities were referred to by counsel for the prisoner, but no case that is binding upon this Court was cited or referred to in which a new trial was granted because the trial Judge prevented counsel from reading reports or text books to the jury. The statute which enables a prisoner

to be defended by counsel, which is now sec. 944 of the Criminal Code, expressly defines the function of counsel in addressing the jury by saying that he is to "sum up the evidence," thus apparently recognizing the clear distinction between the functions of counsel and those of the Judge.

A previous section (942) provides that "every person tried for any indictable offence shall be admitted after the close of the prosecution to make full answer and defence thereto by counsel learned in the law." There is, I think no special force in these words beyond the intended effect of providing that the defendant may be assisted by counsel, and has the right, with such assistance, to make full defence to the indictment.

The clause that deals particularly with the functions of counsel in addressing the jury seems to confine him to the duty of dealing with the evidence. I must confess, however, that in determining this point I do not attach as much importance to the particular wording of these sections as I do to the well-established principle that it is the function of the Judge to give the law to the jury, and, if, in his judgment, they are likely to be misled, bewildered or befogged, as they might well be by dissertations from opposing counsel and citations from legal authorities, I cannot doubt that it is within his discretion to confine the counsel on both sides to their proper functions.

Some minor criticisms were made of the charge of the learned Judge on the ground that he had mis-stated the evidence to the jury. I cannot find that he has done so in any slightest respect. It was said that he had confused in some manner two things referred to in the evidence as a wallet and a "purse"—that the wallet was the article identified by the sister of the deceased as his property, and which was proved to have been taken from the pocket of the prisoner; while it was the "purse" that contained the prisoner's money. It was pointed out by counsel for the Crown that these terms had not been so consecrated that they might not be used interchangeably. But, apart from that altogether, I have not been able to find that any possible prejudice could be caused by the misnaming of the articles referred to—if they were misnamed. The trial Judge did speak of the wallet being filled to overflowing with money. Suppose it was the "purse" and not the "wallet" that was filled, what differ-

ence could it make? The only significance of this fact was that which was properly attributed to it by the trial Judge, namely, the circumstance that the victim had money in his possession, and that the defendant, soon after the killing, was freely expending money, while little or no money was found upon the body of the deceased when it was discovered buried in the woods. The Judge has nowhere, that I can find, referred to this "wallet" containing money as the article that was found in the pocket of the defendant, and it would not have made any difference in the effect of the evidence if he had done so. The essential circumstance in that relation was that the wallet, as the counsel for defendant insists upon our naming it, which was identified as the property of the deceased was found in the defendant's pocket, and the effect of the evidence would be precisely the same whether it was called a wallet or a purse.

It is also complained that the Judge spoke of three spots of human blood, when he should have spoken of one only. He did so, if the charge has been correctly copied, but in the very same sentence he explained that the reaction shewed human blood in only one of them and not in the other two. Even without this explanation, the difference between one drop of blood and three would be of no possible consequence. One drop of human blood would be as damning a circumstance as three, and three drops could be as easily explained by nosebleed as one drop.

When the jury returned to the court-room, one of their number asked if there was any evidence that the deceased had been at Cook's house. The Judge seems to have referred to the statement of the prisoner that he got the money order from Asaff by way of change for a twenty-dollar bill on a purchase of some goods as bearing on the question, and the complaint, if I understood it, was that the Judge should have pointed out that, if this statement was accepted, it would eliminate the circumstances connected with the money order as one of the proofs of prisoner's guilt. It is true that it would do so, but the Judge immediately reminded the inquiring juror that the statement of the prisoner in this regard could not be depended upon. He gave them all the facts within his recollection that bore upon the inquiry, and left the jury to draw their own inferences.

The only remaining ground that was seriously argued was the refusal of the learned Judge to recall the jury for the purpose of instructing them, that, besides being satisfied that the facts were consistent with the prisoner's guilt, they must also be satisfied that they were incapable of any other explanation or hypothesis. This would have been a proper enough instruction (provided the adjective "rational" were inserted before the substantive), which was, no doubt, understood and intended by the prisoner's counsel. But it was unnecessary. The jury had been instructed already more than once that they must be satisfied beyond a reasonable doubt, and the learned Judge had, more than once, cautioned them to the effect that they should not convict unless the evidence produced an irresistible conviction upon their minds. It could not produce an irresistible conviction of guilt if any rational hypothesis could be suggested by which the circumstances could be accounted for. He began his charge with a citation from the charge of Chief Justice Shaw in the celebrated trial of Dr. Webster for the murder of Parkman, which is the *locus classicus* on the subject of circumstantial evidence. I do not see how he could have chosen a safer guide for his footsteps.

The result of my consideration of the points presented is to leave me under no doubt whatever that the prisoner has had a fair trial, and, that being the case, I do not think it would be proper to allow the appeal from the refusal of the trial Judge to reserve a case for this Court.

LONGLEY, J.:—This is a capital case, and, therefore, all points possible for the hearing and determining of questions of law are open to consideration, and must be considered fairly and fully. In this case the application to reserve a Crown case was made to the Judge who tried the case; and he declined the application. Then the counsel for the accused appeared before this Court, and asked to have a case reserved on one or each of the several points. Frankly speaking, there is nothing in the matters of complaint made in respect to the charge of the Judge to the jury that is worthy of any possible consideration. The charge is before us, and I am satisfied that it was an eminently fair charge, strictly impartial on all points and quite as favourable to the prisoner as could possibly be desired. The only point

made that is worthy of serious consideration was in the third clause:—

3. Was I right in stopping counsel for the prisoner and preventing him from referring to the charge of Baron Alderson in his charge to the jury?

The question whether the counsel for either the prisoner or the Crown can submit, to the jury, cases, is entirely one for the discretion of the Judge. The plaintiff can read the section of the Criminal Code Act, under which the offence is committed, and I suppose the prisoner can do the same; but in this case the charge is that the Judge did not allow the counsel for the prisoner to quote the opinion of Baron Alderson, which was on the question of circumstantial evidence, to the jury. I think, beyond all question, that the Judge is entirely justified in preventing counsel from doing so. There are different kinds of Judges. Some permit cases to be submitted to the jury and some do not. The law only allows counsel for the prisoner to "sum up the facts" to the jury. In this case the Judge on the trial of the cause thought it would be awkward to him to permit any of the counsel to read from books when he was to give the law himself, and the law, as given by him, must be accepted as final by the jury, and he undertook to prevent counsel from reading law. Some other Judge may possibly have allowed him, but no instance has been found or given in any Court in the English jurisdiction which makes that a mistake on the part of the Judge. The learned counsel was asked to cite any case tending to have such an effect, and he cited two cases, one in 93 Michigan and the other 74 Michigan.

We know that they have various statutes regulating the rules of the Court in this respect in Michigan and other American States, and, therefore, any judgment which would appear on the point must be taken with the greatest possible care. In this case, in examining the cases cited 93 and 74 Michigan, it is apparent that they are both civil causes, and do not refer to criminal trials, and do not cover any point upon which authority was asked. No English Judge has for a single moment admitted the necessity of admitting such things, and, if they were admitted, then the trial of a cause would be so awkward that it would be difficult to progress to its conclusion.

I have, therefore, reached the conclusion that the grounds set forth in this third paragraph are not tenable and not worthy of consideration. It is, of course, necessary that the counsel should take all points possible in a capital case, urge them with persistency and with force, but, with the exception of the point reserved in the third section, I fail to see anything in the grounds whatever.

I, therefore, have to give judgment refusing the application.

Judgment for the Crown.

[COUNTY COURT FOR DISTRICT NO. 1, NOVA SCOTIA.]

BEFORE HIS HONOUR, W. B. WALLACE, COUNTY COURT JUDGE.

REX v. ALLEN.

1. HUSBAND AND WIFE (§ IV—160)—NON-SUPPORT OF WIFE OR CHILDREN—SUMMARY PROCEEDINGS—WIFE AS A WITNESS.

The amendment to the Criminal Code in 1913 by the addition of new sections 242A and 242B (3-4 Geo. V., ch. 13), will not affect the interpretation of the words "the three last preceding sections" used in sec. 244; the three sections intended are 241, 242 and 243, and these relate to indictable offences as to criminal omission of duty, while the added sections relate to summary convictions for neglect to provide for wife or children; the reference in the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4, to offences against sec. 244 does not constitute the wife of the accused a competent witness against him on a summary hearing of a charge under the added section 242A.

2. WITNESSES (§ I B—16)—WIFE AS WITNESS AGAINST HUSBAND—CRIMINAL LAW—NON-SUPPORT TRIABLE UNDER SUMMARY CONVICTION PROCEDURE.

The evidence of the wife is not admissible against her husband on the hearing before a magistrate of a charge under Code sec. 242A (amendment of 1913) whereby it was made an offence punishable on summary conviction for a husband to neglect without lawful excuse to provide for his wife and children when destitute, as no corresponding amendment was made to the Canada Evidence Act when sec. 242A was added to the Code.

[See Annotation at end of this case.]

3. STATUTES (§ III A—139)—AMENDING STATUTES—NEW SECTION INTRODUCED WITH NUMBER AND LETTER DESIGNATION—CRIMINAL CODE.

Section 242A of the Criminal Code which was inserted by the Code Amendment Act, 1913, is not to be considered a sub-section of sec. 242, but as an entirely independent section.

DECIDED: June 23, 1913.

APPEAL from a summary conviction for non-support.

The defendant was convicted by a Stipendiary Magistrate in and for the County of Halifax for the offence of non-support under

section 242A of the Criminal Code (3-4 Geo. V. cap. 13, sec. 14) and appealed to the County Court for District No. 1 at Halifax.

On the appeal coming on for hearing, the wife of the defendant who was the prosecutrix, was tendered as a witness on her own behalf, which being objected to by the appellant, she was not permitted to be sworn as a witness against her husband and was rejected as such.

The conviction by the magistrate, based largely on the wife's testimony below, was set aside.

HALIFAX, N.S., June 23, 1914.

H. C. Morse, for the appellant, the defendant.

John J. Power, K.C., for the respondent, the prosecutrix.

JUDGE WALLACE:—Under the Canada Evidence Act (R.S.C. cap. 145, sec. 4) the wife of a person charged with an offence against section 244 of the Code is made a competent and compellable witness for the prosecution. Section 244 declares that any violation of any of "the three last preceding sections" shall be an indictable offence, the guilty person being liable to three years imprisonment. Two new sections were enacted in the year 1913, and called 242A and 242B, and it has been contended by counsel before me in a prosecution for an offence against section 242A, that since the enactment of section 242A the words in section 244 "the three last preceding sections" would include 242A and, therefore, that the wife of a person charged under 242A would be a competent witness for the prosecution. Literally the words "the three last preceding sections" in section 244 would embrace 242A and 242B, but if the various sections from 240 to 244 are carefully examined it becomes plain that these words refer to section 241, 242 and 243 and do not include 242A and 242B.

Section 244 deals exclusively with indictable offences, whereas the new section 242A deals exclusively with a new offence, punishable on summary conviction.

The evidence of the wife is not admissible, under the Canada Evidence Act in this prosecution under section 242A, because she is not the wife of a person charged with an offence against section 244. She is the wife of a person charged with an entirely different offence created by section 242A.

While it is a sound general principle that the law shall be considered as "always speaking," nevertheless that principle must be applied so as to give effect to legislation according to its spirit, true intent and meaning. The construction which was contended for by counsel for the prosecution is calculated to defeat the object of Parliament in relation to section 241 and 242 and virtually to repeal these two sections,—which would be left to operate "in the air." I pointed out at the trial in rejecting the evidence in question that section 242A was not a sub-section of 242, but was merely placed in its present position in the Code, because it deals with a duty akin to other duties dealt with by this particular group of sections and that it had no further relation to section 244 than if its number had been 1500.

But even if there were any ambiguity or doubt as to the scope of section 244, such doubt should not be interpreted against an accused where Parliament has failed to express itself clearly.

Wife's evidence rejected and conviction set aside.

Annotation—Witnesses (§ I B—16)—Competency of wife in crime committed by husband against her—Criminal non-support—Cr. Code, sec. 242A

The case of *Rex v. Allen*, above reported, raises an interesting question which there appears to have been no occasion to consider in England since the Criminal Evidence Act, 1898 (Imp.) or heretofore in Canada since the Canada Evidence Act. That is whether, assuming as is done in the *Allen* case that sec. 242A is to be viewed as an entirely separate section of the Code apart from sec. 242, and notwithstanding the non-inclusion of sec. 242A in the list of sections referred to in sec. 4 of the Canada Evidence Act, the wife is not a competent witness against her husband on a summary charge for failure to provide for her, whereby she falls into destitute or necessitous circumstances.

It seems clear that on the creation of a new offence without restriction as to the class of evidence or the competency of the witnesses, the analogy of the common law would apply, together with such general statutory enactments as were referable to the offence or to witnesses or evidence. The Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 2, makes sec. 4 applicable to "all criminal proceedings"; and while sec. 4 specifies particular offences as to which the wife of the accused shall be a "competent and compellable witness for the prosecution" without the consent of the person charged, it further provides, in the fourth sub-section, that "nothing in this section shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person."

Before it can be concluded that the evidence of the wife is not admissible, it is necessary not only to find if the offence is specially designated in sub-

Annotation (continued)—Witnesses (§ I B—16)—Competency of wife in crime committed by husband against her—Criminal non-support—Cr. Code, sec. 242A.

section 2 of sec. 4 of the Canada Evidence Act, but to ascertain if the case comes within the class of common law exceptions under which the wife's testimony was admissible. The common law rule as to the evidence of husband and wife either for or against each other is thus stated in Pritchard on Quarter Sessions (1875), p. 278:—

"In criminal, as in civil cases, there is only one relationship which disqualifies, viz., that of husband and wife. In no case, *except* those where either husband or wife complains of an injury directly inflicted by the one on the other, can either party in this connection give evidence for or against the other. Even where the husband consented to the wife being examined *against* him, the evidence was rejected, 1 Hale, Pleas of the Crown, 47. In case of personal violence or wrong, the wife is from necessity a competent witness against the husband, and the husband against the wife. It is said that a wife is a competent witness against her husband in respect of any charge which affects her liberty and person. *Per* Hullock B. in *R. v. Wakefield*, 2 Lewin, C.C. 1, 279, 2 R.C. & M. 605. So on an indictment against the husband for an assault upon his wife, *R. v. Azire*, 1 Str. 633, Buller, N.P. 7th ed. 287. And upon an indictment under the statute of Henry VII, for taking away and marrying a woman contrary to her will, she was a competent witness to prove the case against her husband *de facto*, and being competent against him she was consequently competent as a witness for him; *R. v. Perry*, Ry. & Mov. N.P.C. 353; though it has been doubted whether if the woman afterwards assented to the marriage and lived with the man for any considerable time, she would be capable of being a witness either for or against him. Roscoe Cr. Evid., 13th ed., 106. In *R. v. Wakefield*, 2 Lewin C.C. 288, 2 R.C. & M. 607, Hullock, B., was of opinion that even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution on the ground of necessity, although there was no evidence to support that part of the indictment which charged force, and also on the ground that the defendant, to whom she had been married after having been illegally taken from her father's custody contrary to the statute then in force as to heiresses, could not by his own criminal act found a claim to exclude such evidence against himself.

It would seem that it is not necessary that there should be force employed in the offence in order to make the husband or wife competent. *R. v. Wakefield*, 2 Lewin C.C. 279; *R. v. Perry* (1794), cited in *Rex v. Serjeant*, R. & M.N.P.C. 354; 3 Russell on Crimes, 5th ed. 626 (n).

A wife is always permitted to swear the peace against her husband Taylor on Evid., 10th ed., vol. 2, p. 973; Roscoe's Crim. Evid., 12th ed. 109, 13th ed. 106. Upon the trial before justices under the Vagrancy Act, 5 Geo. IV (Imp.), ch. 83, for neglect to support wife and children whereby they became chargeable to the parish as paupers, it was held that the wife's evidence was not admissible against her husband, for the neglect was considered merely as an offence against the parish. *Reeve v. Wood* (1864), 10 Cox C.C. 58, 5 B. & S. 364, 34 L.J.M.C. 15. In that case the court of King's Bench (Crompton, Blackburn and Mellor, JJ.) all concurred in the view

Annotation (continued)—Witnesses (§ I B—16)—Competency of wife in crime committed by husband against her—Criminal non-support—Cr. Code, sec. 242A.

that the punishment provided by the statute was in respect to the chargeability to the union or workhouse funds and *not* for an alleged wrong to the wife and therefore that the evidence of the wife could not be received against her husband. Crompton, J., said it did not fall within the rule of necessity, for there are many other persons by whom the case may be made out without her evidence. Blackburn, J., thought it was not within the principle of *Lord Audley's case*, 1 St. Tr. 393, which made to the general rule an exception admitting the wife's evidence where she may be the only person who is cognizant of the offence concerning her person. Mellor, J., said there had been no personal wrong done to the wife in the sense of any of the decided cases. *Reeve v. Wood*, 10 Cox C.C. 58; and see *Sweeney v. Spooner*, 3 B. & S. 330.

But the Criminal Evidence Act (Imp.), 1898, made the wife not only a competent but a compellable witness in prosecutions under the Vagrancy Act, 1824, for neglect to maintain, such as was before the court in *Reeve v. Wood*, 10 Cox C.C. 58, 34, L.J.M.C. 15. *R. v. Acaster* and *R. v. Leach* [1912], 1 K.B. 488 at 493.

In *R. v. Jagger*, Russell on Crimes, 5th ed., vol. 3, p. 625, the prisoner was indicted for attempting to poison his wife by giving her a cake which contained arsenic, and the wife was admitted to prove the fact that her husband had given her the cake. The ruling by which the evidence was admitted was affirmed by all of the judges *en banc*. The ground for the admission could only be founded upon the exception *ex necessitate* to the general common law rule of incapacity between consorts to give evidence one against the other.

In the Ontario case, *Reg. v. Bissell*, 1 Ont. R., 514, decided by the Ontario Queen's Bench Division in 1882 before the passing of the Canada Evidence Act, it was held that the evidence of the wife was inadmissible on the prosecution of her husband by indictment under the Canada statute 32-33 Vict., ch. 20, sec. 25. That statute made it a misdemeanor in any person who was legally liable as husband, guardian, etc., to provide for any person as wife, child, apprentice, etc., necessary food, clothing or lodging, wilfully and without lawful excuse to refuse or neglect so to provide. The majority of the Court in *R. v. Bissell*, 1 O.R. 514, (Hagarty, C.J., with whom Cameron, J., concurred) thought the prosecution had failed to shew that the case falls within the exceptions allowed to the general rule. As said by Hagarty, C.J., at p. 519:—

"Force or injuries to her person or liberty, forcible or fraudulent abduction, or inveigling into a marriage procured by friends have been held to be admitted exceptions. I have not met with any case where the charge was wholly of non-feasance, decided to be an exception to the rule. It is said, not very directly, that there is also an exception from necessity where the offence cannot be proved except by the wife. Conceding for the argument that it is so, the case presented to us does not shew any such necessity. The charge against defendant is stated to have been proved by other witnesses. The wife was called to prove the non-supply of money from a named date, with a refusal so to do. In cases like these it may be that the charge can be fully made out without the wife's evidence."

Annotation (continued)—Witnesses (§ I B 16)—Competency of wife in crime committed by husband against her—Criminal non-support—Cr. Code, sec. 242A.

Armour, J., afterwards of the Supreme Court of Canada, dissented from the opinion so expressed by Hagarty, C.J., and thought the wife was a competent witness. He based his reasoning on two grounds, first from the necessity of the case, and secondly, because it is a crime committed by her husband against her. He added:—

“The second ground really springs from the first, for the reason of the wife being admitted as a witness against her husband where a crime has been committed against her by her husband is “from the necessity of the case,” for were she not admitted, the crime might go unpunished and in all the authorities that I have been able to examine upon the subject, I find necessity to be the foundation for the admission of a wife to testify against her husband; and if on a prosecution such as the one I am now considering a failure of justice must take place unless the wife is admitted to testify. I think she is competent to testify.”

See also reference to the Bissell decision in *Mulligan v. Thompson*, 23 O.R. 54.

The decision in the *Bissell* case cannot well be said to have passed into settled law for the subsequent statute, the Canada Evidence Act, 1893, made the wife a competent and compellable witness in such a case. See now secs. 242 and 244 of the Criminal Code, 1906, and the revised Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4.

The importance of the *Bissell* decision is now revived because of the legislation creating the new offence stated by the added sec. 242A, inserted in the Code by the Code Amendment Act of 1913 (1913 Can. Statutes, ch. 13). The legislation is of a similar character to that under consideration in the *Bissell* case, and it furthermore bears indications that it was to be available as a remedy for the wife against her husband. The offence is made punishable “on summary conviction”; a new duty in so far as the criminal law is concerned is created with a criminal penalty for infraction, and one of the elements of the new offence is in case of the wife, that she is in “destitute or necessitous circumstances.” The destitution or necessity of the wife may frequently be provable *ex necessitate* only by the wife’s evidence. The statute was passed for the wife’s further protection by summary process and seems to imply that she may be the informant and chief witness. Section 242B as to inference of marriage and parentage appears to forecast the calling of the wife as a witness, and to be intended to aid her in proving her status as a wife, although she may not be able to prove that the marriage ceremony was in accordance with the laws of the country in which it took place. These considerations seem to favour the admission of the wife’s testimony under the common law exception *ex necessitate* above referred to, and to be opposed to the ruling of Judge Wallace in *Rez v. Allen*, above reported (head note 2). As regards the force of the decision of *R. v. Bissell*, 1 Ont. R. 514, above referred to, there is much to be said in favour of the dissenting opinion of Armour, J.

[SUPREME COURT OF ONTARIO.]

BEFORE MIDDLETON, J., IN CHAMBERS.

REX v. HUCKLE.**1. CRIMINAL LAW (§ IV H—153)—PARTIAL REMISSION OF SENTENCE FOR GOOD CONDUCT IN PRISON—POWER TO REVOKE OR FORFEIT.**

A convict in a penitentiary may provisionally earn a remission of part of his sentence by good conduct duly certified in pursuance of the Penitentiary Regulations of November, 1898; but remissions so earned are subject to forfeiture under such Rules and this without any hearing in the nature of a trial or any right of the convict to be heard.

2. HABEAS CORPUS (§ I C—12)—PENITENTIARY REGULATIONS OF 1898—PARTIAL REMISSION OF SENTENCE FOR GOOD CONDUCT.

Primâ facie the warden and officers of a penitentiary are to determine questions of remission of part of sentence under the Penitentiary Regulations of November, 1898, for good conduct of the convict while in the prison, and also questions of the forfeiture of remissions earned, subject to review and sanction by the Minister of Justice under such Regulations; it is not open to the Court on *habeas corpus* to enquire into the validity of a direction contained in a report duly approved by the Minister forfeiting on the ground of misconduct the periods of remission previously earned by the convict.

DECIDED : June 30, 1914.

Motion, upon the return of a habeas corpus, to discharge a convict from custody.

G. Russell, for the applicant.

W. G. Thurston, K.C., for the Crown.

MIDDLETON, J.:—Huckle was convicted before His Honour Judge Snider of extortion, and sentenced to seven years' imprisonment, on the 12th December, 1908. His sentence will not expire by effluxion of time until the 12th December, 1915.

Under sec. 64 of the Penitentiaries Act, the Inspectors of Penitentiaries are empowered, subject to the approval of the Minister of Justice, to make regulations under which a record may be kept of the daily conduct of every convict, noting his industry and the strictness with which he observes the prison rules, with a view of permitting the convict to earn a remission of a portion of the time for which he is sentenced, not exceeding six days for every month during which he is exemplary in conduct and industry. When the convict is thus accorded

seventy-two days of remission, he is allowed to earn ten days' remission for each subsequent month during which his conduct and industry continue satisfactory. Under the statute, for certain offences, such as attempting to escape, or assaulting officers, the whole remission earned may be forfeited.

Rules were prepared and approved by the Governor-General in Council on the 26th November, 1898. These Rules provide that the Warden may deprive a convict of not more than thirty days of remission for any offence against prison rules, and that there may be forfeiture of more than thirty days with the sanction of the Minister of Justice. Section 65 of the statute provides for the drawing up of a list of prison offences, a copy of which is to be placed in each cell in the penitentiary.

This motion is based upon a fundamental misconception of the provisions of the statute. It is assumed that the convict is entitled as of course to a remission of his sentence unless he is deprived of it for misconduct. A convict may so behave himself that he cannot be regarded as exemplary in conduct and industry, and yet not be guilty of any offence against the prison rules. In that case he would serve the full term of his sentence, for he would have earned no remission. A convict, on the other hand, may, by reason of exemplary conduct and industry, earn a shortening of his sentence, but he may by specific offences forfeit that which he has earned: e.g., this convict apparently had earned some remission, I do not know how much; but on the 18th October, 1910, the Minister of Justice approved of a report of the Warden, dated the 8th September, 1910, by which all remission then accorded was forfeited.

Another fundamental misconception underlying this application is the assertion that the applicant is not bound by the penitentiary regulations; it is said that he has not been furnished with a copy of them, and that he ought not to be bound by any rules of which he has no knowledge. Apart from these rules, there is no right of remission, for the remission is, by the statute, to be under the regulations prescribed.

Then it is argued that the award of remission or the forfeiture of remission must be on some proceeding in the nature of a trial, so that the convict may be heard. This is clearly not

what is contemplated by the Act. Some one must determine whether the conduct of the convict is exemplary. *Primâ facie* the Warden and officers of the prison must discharge this duty. Their conduct will be subject to review by the Minister; but the statute surely does not contemplate a controversy in the Courts over a question of prison discipline.

The Habeas Corpus Act probably has no application to this case, and I am not sure that the writ was not granted per incuriam. It does not apply to any person imprisoned by the judgment, conviction, or order of the Supreme Court or other Court of record. Where, as here, the accused is imprisoned under a conviction, he must seek redress by application to the Minister of Justice, who alone appears to have authority to review the action of the prison officials.

The application is, therefore, dismissed with costs, and the convict is remanded to custody.

Since the above was written I have been handed a statement shewing that, apart from cancelled remission, the accused has 87½ days to serve, and in addition 117 days forfeited—204½ days in all.

Motion dismissed.

[SUPREME COURT OF ONTARIO.]

BEFORE MIDDLETON, J., IN CHAMBERS.

REX v. FAUX.

1. MUNICIPAL CORPORATIONS (§ II C 1—54)—BY-LAW AGAINST DRUNKENNESS IN PUBLIC PLACES—REMEDYING OMISSION TO AFFIX SEAL—CONVICTION FOR OFFENCE PRIOR TO SEALING.

Because of the validating provisions of the Ontario Municipal Act, 1913, sec. 258(3), R.S.O. 1914, ch. 102, sec. 258(3), in respect of municipal by-laws which were not duly sealed when passed, a summary conviction under an unsealed municipal by-law cannot be quashed, although the by-law was sealed only after objection taken before the magistrate at the hearing of the charge, as the effect of the statute is to permit the sealing to relate back to the date of passing the by-law.

DECIDED: June 30, 1914.

Motion by the defendant for an order quashing his conviction by a magistrate for being drunk in a public place in the township of Otonabee, contrary to a by-law of the township.

The objection was that a valid by-law was not proved; the original not having been sealed when passed, and the corporate seal having been affixed only after the objection was taken before the magistrate.

By the Municipal Act, 1913, sec. 258(3), it is provided: "Where, by oversight, the seal of the corporation has not been affixed to a by-law, it may be affixed at any time afterwards, and, when so affixed, the by-law shall be as valid and effectual as if it had been originally sealed.

G. N. Gordon, for the defendant.

J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—This motion, I think, fails. The true effect of the sealing of the by-law is to validate it from the beginning. The legislative will was then exercised, and the intention of the Legislature was to permit the sealing to relate back; and, after the sealing has taken place, I am to treat the by-law as a good and valid by-law from the date of the passing.

Motion dismissed with costs.

Conviction affirmed.

[HALIFAX COUNTY COURT, NOVA SCOTIA.]

BEFORE HIS HONOUR W. B. WALLACE, SITTING AS AN EXTRADITION JUDGE.

UNITED STATES v. TOUNDER.

1. EXTRADITION (§ I—4)—STEALING—RESTITUTION OF MONEY TAKEN FROM PRISONER WHEN ARRESTED—PROVING IDENTITY WITH MONEY STOLEN.

Where there is no proof of identity of the money found on the prisoner, when arrested, with the money which he charged in extradition proceedings with having stolen, the extradition Judge should order the return to the prisoner of the money taken from him by the police at the time of arrest.

DECIDED: May 4, 1914.

THE prisoner was arrested and detained under the Extradition Act on a provisional warrant charging him with the theft of five hundred dollars from an incorporated bank in Tacoma, State

of Washington, U.S.A., and was arraigned before Wallace, C. C.J., sitting as an extradition Judge. On the prisoner at the time of his arrest was found a number of ten dollar bank notes issued by banks doing business in the State of Washington and some American gold in the aggregate to \$300.

Cluney, K.C., for the alleged fugitive, asked for an order restoring the money to his client on the ground that it was not identified.

W. J. O'Hearn, for the U.S. Government, admitted that there was no proof of identity, but contended that the demanding State was entitled to have the money returned with the fugitive under section 1050 (3) of the Criminal Code of Canada, 1906.

Cluney, K.C., in reply :—Section 1050(3) applies only to the "trial" of an indictable offence in Canada.

JUDGE WALLACE, in an oral judgment, held that under the Extradition Treaty and Act moneys found on the accused and not identified must be returned to him. Section 1050(3) of the Criminal Code does not apply.

Order for return.

[SUPREME COURT OF ALBERTA.]

JUDICIAL DISTRICT OF CALGARY.

BEFORE HARVEY, C.J., STUART AND SIMMONS, JJ.

REX v. EDMUNDS.

1. APPEAL (§ VII L 2—477)—CRIMINAL LAW—REVIEW OF CONVICTION ON QUESTION OF LAW—SUFFICIENCY OF EVIDENCE.

Although the evidence of theft is contradictory and unsatisfactory in the opinion of the Court determining merely the question of law on a case reserved as to the sufficiency of the evidence to sustain a conviction, the Court will uphold the finding of guilt if supported by sufficient legal evidence.

DECIDED: June 30, 1914.

CROWN case reserved on a charge of theft.

The conviction was affirmed.

E. B. Cogswell, K.C., for the Crown.

J. M. McDonald, for the accused.

The judgment of the Court was delivered by STUART J.:—
It seems to me after reading the evidence in this case that the only way in which an inference of guilt could be made is by finding some facts which tend to prove that the three loads of hay which the accused was seen to be drawing did not belong to him; in other words, that there could not possibly have been at that date any hay at the stacks in question which belonged to the accused. The fact that the complainant Pugh did not get all the hay he expected is of no weight when it is admitted that he was not there from October to January and that fifteen tons in any case had been eaten by cattle. Other people may have taken the hay.

Now, in the first place, the evidence is very meagre from which the Court was asked to infer that at the so-called division, there was ever any definite assignment of certain stacks as belonging to each of the parties. At that time stack three had been drawn away by the accused and part of stack one. These two together would give just about the amount of hay that the accused was to get. I think the evidence was perhaps sufficient to justify an inference that these two stacks were considered as constituting the share of the accused. It would be one ton short, but the complainant managed to buy that ton from the accused having it on the other stacks. If it were not for the possibility of making this inference (though the fact was not directly stated by Pugh) I think there would be nothing in the case at all, because in my opinion everything depended on that fact being established. If it were not established, then there would be nothing to shew that the three loads the accused drew in February might not have been really his own; because the balance of stack one might have been eaten up by cattle or stolen by someone else for that matter. It is true that Pugh said the balance of his stack was drawn away by the accused within a week or ten days after the 21st of October, but he admitted that he was not

there again until January 1st or 4th, and, therefore, his evidence on that point must have been hearsay. He said the balance of stack one was gone on January 4th, but there is really nothing to shew who took it. It is, therefore, really only upon the fact that the balance of stack one was assigned and appropriated definitely to the accused that the case against him depends. Yet Pugh never swore directly to that fact.

With regard to the inference to be drawn from Pugh's calculations and statements of the amount he was short, in my opinion, they are absolutely worthless. He admits himself that fifteen tons of the hay was eaten by cattle. How does he know that some more might not have been eaten? There is nothing to shew this. In one place, also, he says he got $7\frac{1}{2}$ tons from stack 4 and in another place that $7\frac{1}{2}$ tons out of that stack were eaten by cattle. Yet there were only $10\frac{7}{8}$ tons in it altogether.

However, if stack one was definitely assigned to the accused upon the so-called division and it was all gone in January, then it is possible to infer that the three loads he was taking in February did not belong to him and so to infer guilt. To me the evidence is, as I read it, most unsatisfactory, but it might, as I can easily understand, make a different impression on the mind of a trial Judge, who heard it given orally.

With some regret, therefore, I think the conclusion ought to stand. I may add that it is, in my opinion, very unfortunate that the accused was not permitted by his counsel to go into the box and tell his own story of the affair.

Conviction affirmed.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE GERVAIS, J.

REX v. GRAND TRUNK R. CO.**1. RAILWAYS (§ II B—23)—OBSTRUCTION OF STREET CROSSING—STANDING CARS—OPERATION OF GATES.**

To justify conviction of a railway company under sec. 394 of the Railway Act (Can.) for obstructing a street crossing by allowing cars to stand across the street, it must be shewn by the prosecution that the obstruction was wilful, and where the crossing was protected by gates and the only evidence was of the times when the gates remained closed against street traffic for periods in excess of five minutes, a conviction should be quashed where it was not shewn that any one train or car caused the obstruction, nor was it shewn that the delay was not attributable to the gateman rather than to the trainmen; sec. 394 of the Railway Act does not apply to obstruction caused by the gateman's neglect at a street crossing.

APPEALS from seven summary convictions of the railway company for obstructing street crossings by standing trains.

The appeals were allowed and the convictions quashed.

A. E. Beckett, K.C., for appellant company.

J. L. Butler, for the Crown.

By consent, the parties have joined the seven present appeals from summary convictions rendered on the 19th November, 1913, against the appellant for having wilfully obstructed St. Ferdinand Street in St. Henry Ward in the City of Montreal, by allowing a car or engine to stand across said street for more than five minutes at a time, on the following dates:—three times on the 12th May, 1913; twice on the 13th May, 1913; and twice on the 5th June, 1913.

The judgments appealed from were rendered by the Police Magistrates' Court for the District of Montreal, which imposed two fines of ten dollars, four fines of five dollars, and one of twenty-five dollars, with costs in each case.

The parties, at the hearing of the appeals, agreed to submit the same upon the evidence adduced by them in the Court below, presided over by Mr. Magistrate Ulric Lafontaine; the said evidence consisting of the depositions of the witnesses on both sides taken by stenography, and some plans shewing the locality where the shunting yard of the company is situate, in St. Henry ward.

From what was said before us, it looked as if these cases had been made out by the City of Montreal, at the suggestion of the Montreal Street Railway Company, which had to complain for a long time that its tram cars were delayed at the St. Ferdinand Street crossing, on account of obstruction of the same by the railway company's cars.

Mr. Beckett, for the Grand Trunk, submitted that there was no proof that any such obstruction by his company had ever been made, as alleged in the complaint; and that, at any rate, no such wilful obstruction had been proven on behalf of the appellant. The appellant's attorney also urged that it was one of its rules towards its employees that they were liable to suspension or dismissal from its service for any obstruction by them of any public highway, and especially for the blocking of such a street as St. Ferdinand Street.

Mr. Butler, on behalf of the Crown, while admitting such instructions to its employees on behalf of the company, contended that the complainant was not bound to prove any wilful obstruction; that the same was proved; that such proof as a rule was impracticable.

Two questions have to be decided in this case: (1) Was there evidence that the appellant was guilty of allowance of one of its cars to stand on said street for more than five minutes at a time? (2) Was such allowance wilful?

I do not rely much on the official shunting records of the appellant on the dates in question, as the keeper of these records was not there on the spot, that is, at St. Ferdinand Street crossing, to substantiate his data, and as the same were made under telephonic instructions from Turcot village shunting office.

Curiously enough, the complainants' witnesses, while spying upon the management of the railway company's cars by the employees of the appellant, at St. Ferdinand Street crossing, kept away from the gatekeeper there, as well as from the employees of the appellant.

The witnesses of the complainant did not shew themselves to the said gatekeeper or to the enginemen, trainmen, or conductor in charge of the trains passing at the crossing.

In a word, the constables sent by the city to make out the cases against the Grand Trunk Railway Company of Canada

kept themselves out of sight from the Grand Trunk Railway Company's employees; they never said a word of complaint to any of them, more especially to require from them the cutting of the train so as to give free access to vehicles and passers-by on St. Ferdinand Street.

They seem to rely on the old Railway Act which did not provide for "wilful" obstruction in order to constitute a violation of Article 394.

To sum up, the company which is being sued without any one of its employees being made party to the cases, has never been put *en demeure* to shew whether or not they did wish to obstruct the said street, as it is charged in the complaint.

It was proved, and it is well known, that on both sides of the railway of the appellant crossing St. Ferdinand Street, there is a gate under the guidance of an employee of the Grand Trunk, whose duty it is to lower the same when a train is approaching the crossing, and raise it as soon as the train has passed. No proof was adduced that the gatekeeper had been delinquent in his duty.

Did the witnesses for the prosecution prove the charge against the appellant? Three or four witnesses were heard on behalf of the Crown. They all swore that there had been a closing of the gates for more than nine, twelve, eighteen, twenty or thirty-two minutes. None of them proved that any special car or engine of the appellant was allowed to stand across St. Ferdinand Street more than five minutes at a time. On being cross-examined by Mr. Beckett for the appellant, all the witnesses admitted that they had based their calculations of the five minutes from the time of the lowering of the gates up to their being raised.

There is no evidence to show that during the period of the closure of the gates there was any car at a standstill across the road; that there was not a continuously passing train, or that the gatekeeper was not too negligent to raise up the gates promptly after the passage of each train, but was waiting to raise the same until some following train had passed; or, in a word, that the gatekeeper had not taken upon himself to do his duty in a leisurely way.

There is an offence under Article 394 of the Railway Act of Canada for wilful allowance of a car on a street during more than five minutes at a time, but there is no offence under the present

law for obstructing a public street crossing a highway, by means of gates not properly handled.

After having read carefully the evidence I have come to the conclusion that there may have been in the cases presumption to some extent, of violation by the appellant of the Railway Act, but that there is no clear conclusive evidence of the same.

Now, have the company, if they have allowed any of their cars to stand across St. Ferdinand Street on the dates in question more than five minutes at a time, done it "wilfully"? This is a very important question which the Court has also to decide.

As we have said, the would-be guilty of violating the law, that is, the enginemen and conductors, and the trainmen in charge of the Grand Trunk trains on the dates in question, could have been prosecuted with the appellant, but they are not before the Court. The company alone has been prosecuted, but the company has had promulgated a rule subjecting to suspension and dismissal from service any employee blocking St. Ferdinand Street crossing with its cars.

The enginemen and conductors in question could have been made very easily wilful transgressors of the law, by being called upon to cut up their train so as to clear the street, and by their refusal to do so, but we have no such proof.

It was up to the prosecution to bring evidence of "wilful" obstruction. What does the word "wilful" mean? It means "designed," "intentional" or "malicious," even when it is used in a penal statute; it conveys always the idea that the person acting wilfully does so, through an act of his volition, knowing what he wants to do is against the law, but doing it just the same, without excuse, acting as a free agent.

Such is the definition that I find in most of the legal dictionaries, especially in those of Bouvier, Stroud and Black. But if this is the definition of the word "wilful" which was not added by the Act 3 Edward VII, chapter 58, as it was contended, there is surely no proof of a violation of the amended article 394 of the Railway Act of Canada on behalf of the appellant, as the Crown alleges.

Upon the whole I am of the opinion that the charges as brought against the appellant have not been proven and I do maintain the appeals and quash the convictions.

Convictions quashed.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE GERVAIS, J.

REX v. "THE STADIUM."

1. SUNDAY (§ II—6)—SPORTS AND AMUSEMENTS—SKATING RINK—FRANCHISE TO CLUB UNDER QUEBEC STATUTE.

As section 16 of the Lord's Day Act, R.S.C. 1906, ch. 153, preserves in any province the provisions of any Act or law already in force there, an athletic institution which has acquired the rights and franchises granted by statute of the province of Quebec to an athletic club prior to the federal "Lord's Day Act" including by implication the right to keep its skating rink open on Sunday, has the right to maintain and operate a public skating rink on Sunday if permitted to do so under municipal by-laws and ordinances.

DECIDED: June 22, 1914.

APPEAL on behalf of "The Stadium" from a conviction which was handed down against it on the 31st day of March, 1913, by the Police Magistrates' Court for the district of Montreal, imposing a fine of \$50 for having kept open a skating rink on the Sunday dated 12th January, 1913, in Montreal.

The parties by consent have submitted the present appeal, at the argument, upon the evidence which had been adduced in the Court below, as well as upon the documents filed in the case.

Rinfret, K.C., for the appellant.

McGoun, K.C., for the Crown, appearing by special leave.

GERVAIS, J.:—The appellant is charged with having violated according to the complaint dated the 12th February, 1913, the Dominion Lord's Day Act by keeping running a skating rink on the Sunday.

The appellant admits the fact of the opening of the said skating rink, but he avers as a plea in bar that it had bought, in 1905, by virtue of Act 5 Edw. VII., ch. 89, sec. 5, the rights, privileges

and franchises, especially the right to keep open a public skating rink, which had been granted to the Amateur Athletic Association "Le Montagnard," constituted as a corporation by Letters Patent issued by the Lieutenant-Governor in Council of the Province of Quebec on the 3rd December, 1898, and on the 6th of April, 1904.

As a second ground of defence, the appellant alleges that he has kept open the said skating rink even on Sundays, in accordance with the by-laws of the said corporation of La Montagnard and that of "The Stadium," the whole in accordance with the usages of the Province of Quebec in virtue of its own law relating to Sabbath Day Observance.

In the third place, the appellant refers to section 6 of the said Act, 5 Edw. VII. ch. 89, as the same merely prohibits on a Sunday the exercise of certain powers herein mentioned and relating only to the sale on that day of refreshments or intoxicating liquors, or the keeping of a roof garden.

Finally, the appellant contends that by the interpretation *a contrario* of said section 6, side by side with section 5, it is authorized to keep its said skating rink open on a Sunday.

These four allegations on behalf of the appellant are proven.

What is the consequence to be drawn from it?

It is clear that the said Act, 5 Edw. VII., ch. 89, has confirmed expressly the rights, privileges and franchises which had been granted by Letters Patent, some twelve years ago, to its predecessors "Le Montagnard."

If we examine side by side section 5 of the said Act, which contains no prohibition to keep the said skating rink open on Sunday, and section 6 which enacts prohibition to exercise certain powers under the same section on Sunday, we have to come to the conclusion that *a contrario* the special Act has regulated as far as the appellant is concerned, the maintenance on Sunday of the said skating rink. It must be conceded that in any penal statute case, or a criminal law case, the strictest interpretation must be given to any enactment, in favour of the defendant.

Finally, we must take into consideration the fact that the Federal Act on Sabbath Day Observance in its 16th section spe-

cially enacts that nothing can be construed in the Federal Act as to annul and set aside any Provincial Act already passed for the regulation of Sabbath Observance.

For all these reasons we think that there is error in the conviction brought about against the appellant on the 30th day of March, 1913, by the Police Magistrates' Court for the District of Montreal.

Seeing article 16 of chapter 153 of the Revised Statutes of Canada, 1906, as well as the provincial Act of Quebec, 5 Edw. VII. ch. 89, this Court proceeding to render the judgment which should have been given in the Court below, doth maintain the present appeal; doth quash the said conviction; and doth acquit the appellant from the said charge, that of having on the 12th day of January, 1913, violated the Federal Sabbath Observance Act.

Conviction quashed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J.

REX v. COOK (No. 2).

1. CRIMINAL LAW (§ IV H—150)—REPRIEVE—DEATH SENTENCE—DISCRETION OF TRIAL JUDGE—PROPOSED APPEAL TO PRIVY COUNCIL FROM PROVINCIAL COURT OF APPEAL.

The right of the trial Judge in a capital case to grant a reprieve of the death sentence is discretionary; and where it is sought for the purpose of appealing to the Judicial Committee of the Privy Council on a point of a purely technical character, quite apart from the merits of the conviction, and after a decision by the provincial Court of Appeal against the prisoner, a reprieve will be refused if in the Judge's opinion the further appeal which could be had only by an application to the Privy Council for special leave would be a frivolous one.

DECIDED: June 13, 1914.

THIS was an application for a respite of the sentence of death under sec. 1063 of Code. The prisoner was convicted of murder at the Halifax (March, 1914) criminal term and was sentenced to death. An application was made to Ritchie, J., the trial justice, to reserve certain questions of law, among them the following,

"Is section 27, chapter 155, R.S.N.S., 1900, *ultra vires* of the Legislature of Nova Scotia," which application was refused. An appeal was unsuccessfully asserted from said refusal to the full Court: *R. v. Cook*, 23 Can. Cr. Cas. 50.

A petition to the Judicial Committee of the Privy Council asking special leave to appeal from the judgment of the Supreme Court of Nova Scotia in respect to the question set forth herein, was lodged and served on behalf of defendant.

W. J. O'Hearn, for the motion. Defendant is *bonâ fide* endeavouring to appeal on a constitutional question and has a certificate as to arguability of point involved. The Judicial Committee will entertain such an application where a constitutional question is involved. The application cannot be heard until July 6th. The sentence is to be carried out on June 30th.

Jenks, K.C.:—The order asked for is discretionary. The point raised is technical. Defendant has failed to account for his delay since sentence passed.

RITCHIE, J.:—The prisoner is under sentence of death, having been convicted of the crime of murder. I am asked under section 1063 of the Code to grant a reprieve in order that his counsel may have an opportunity of applying to the Privy Council for leave to appeal. The question which the prisoner's counsel desires to raise is as to whether or not section 27 of the Judicature Act which fixes the times when Courts of Criminal jurisdiction are to sit is *ultra vires* or not.

Section 92 of the British North America Act gives to the Provincial Legislature exclusive jurisdiction in regard to "the administration of justice in the province including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction and including procedure in civil matters in those Courts."

Section 91 gives to the Parliament of Canada exclusive jurisdiction in regard to "the criminal law except the constitution of Courts of criminal jurisdiction, but including procedure in criminal matters." Is the fixing of the dates when the Courts shall sit part of the organization of the Courts or is it procedure? If the former, then the legislation is within the powers of the local

legislature. I was so strongly of opinion that it came under the head of organization that I refused to reserve the point for consideration by the Supreme Court of Nova Scotia; an appeal was taken from my refusal, which was dismissed. I must follow the Court and not the opinion of Mr. Lefroy, particularly as I do not agree with the reasoning mentioned in his opinion.

The case of *R. v. Stewart*, 15 Can. Cr. Cas. 331, cited on behalf of the prisoner, has, in my opinion, no application. In that case the accused elected to be tried before the County Court Judge. The Judge fixed a day for the trial, but in consequence of illness was unable to attend. Subsequently he fixed another day for the trial. It was held that it was competent for him to take this course. The contention was that the Judge had lost jurisdiction because the trial did not take place on the day first mentioned. That contention was obviously unsound, the Judge being once seized with jurisdiction, had the inherent right to proceed with the trial when he deemed best and that right is one entirely apart from any question of constitution under the British North America Act.

I think an application to the Privy Council for special leave would be a frivolous application and, therefore, I will not grant a reprieve in order that it may be made.

I am by no means sure that I would grant a reprieve even if I thought there was something in the point sought to be raised. It is a point of a purely technical character and one in which the guilt or innocence of the prisoner is not involved. I have discretion to grant a reprieve under section 1063; I would hesitate a long time before I exercised that discretion in favour of this prisoner, who has been properly convicted of murder in cold blood in order to steal.

Reprieve refused.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE GERVAIS, J.

REX v. BELMONT.**1. JUSTICE OF THE PEACE (§ III—12)—JURISDICTION ALSO AS SUMMARY TRIAL MAGISTRATE—SUMMARY CONVICTION OR SUMMARY TRIAL PROCEDURE.**

Where trials for keeping a disorderly house and for frequenting a common bawdy house are held before a magistrate having jurisdiction to proceed to a summary conviction under the vagrancy clauses (Cr. Code, sec. 228) or to a summary trial without consent under Code sec. 774 (amendment of 1909), it will be taken in the absence of any express statement in the record of proceedings to indicate which procedure was being followed, that the magistrate acted under the power of summary conviction from which an appeal would lie rather than that he acted under the powers of Code sec. 774 upon summary trial from which there would be no appeal.

DECIDED: July 6, 1914.

APPEALS by Paulette Belmont and others, heard together by consent, from eight several convictions against the eight appellants, defendants, one of whom was convicted of keeping a bawdy house and the others for being frequenters of the same.

The appeals were allowed and the convictions quashed.

J. C. Walsh, K.C., for the Crown.

A. Germain, K.C., for the accused.

GERVAIS, J.—The appellants, numbering eight, seek to set aside the convictions to a term in jail which were given against them by the recorder of the city of Montreal for having kept a common bawdy house in Montreal during the month of March, 1914.

By consent, the eight present appeals have been joined.

The evidence of the Crown through three constables shews that the house kept by the accused had a bad name, that it was looked upon by them as a common bawdy house wherein and

wherefrom men and women were seen during the day and night coming; but the witnesses of the Crown cannot swear that any act of prostitution had taken place therein, as they have never been there, and that they cannot bring witnesses to bear out the ill repute of the place.

On behalf of the defence a fireman of the city of Montreal was heard, and he swore that he had been for some months a boarder in the house, and that he had not seen anything improper there.

One of the accused took the stand and swore that she was there as a mere boarder and that she was earning her livelihood as an employee in a St. Lawrence street ice cream parlour.

Two questions have to be decided:—

1st. Are these convictions appealable?

2nd. Is the proof of the offences alleged sufficient?

By examining carefully both complaints and convictions, one cannot see if they have been taken or rendered under the law relating to bawdy houses, viz.: Articles 225-228-229 of C.C., or under articles 238, C.C., punishing vagrancy.

Have these cases been tried under the Summary Convictions part or the Summary Trial part of the Code?

Amongst all the accused, only one is charged with having kept a disorderly house, that is, a common bawdy house. The others are before the Court for having frequented such a place.

Let us quote at once the new article 239 as amended by 3-4 Geo. V., ch. 13, which limits punishment for such frequenting to a fine not exceeding \$100, or in default to two months' imprisonment, for those who are found without reason in a disorderly house.

The records do not shew any declaration of intention on behalf of the recorder to sit in the present cases in virtue of article 773, C.C., which merely declares that "the magistrate may, subject to the subsequent provisions of this part, hear and determine the charge in a summary way."

Article 774, C.C. [amendment of 1909], declares that

The jurisdiction of the magistrate is absolute in the case of any person charged with keeping a disorderly house, or with being an inmate or habitual frequenter of a common bawdy house, and does not depend on the

consent of the person charged to be tried by such magistrate, nor shall such person be asked whether he consents to be so tried.

2. The provisions of this part do not affect any absolute summary jurisdiction given to justices by any other part of this Act.

It is not indifferent for an accused to be tried for keeping a disorderly house or for frequenting it, under Part XV., or Part XVI., since 1913, that is to say, the passing of the Act, 3-4 Geo. V., ch. 13, amending article 797, C.C., by refusing appeal when the conviction for such offence has been given under the Summary Trials part, not presided over by two justices of the peace sitting together, but by a magistrate such as the said recorder; and a *contrario* not abolishing appeal allowed under article 749 in any case decided, under Part XV., relating to Summary Convictions.

Should the prosecution be taken under article 228, C.C., it may give rise to a summary trial, if presided over by a magistrate there is no appeal from his conviction under the amendment of 1913.

On the other hand should the prosecution be taken under article 238 relating to vagrancy under paragraph "j" and "k," the trial may be made before two justices of the peace or a magistrate having their jurisdiction.

If the trial takes place, under article 228, the punishment may be one year's imprisonment; if held under article 238, the punishment may only be for six months in jail or a fine not exceeding \$50.

The consequence of the utter differences between the two enactments is very easily seen to be of the utmost importance for an accused.

The accused has no choice, between a Summary Convictions Trial or a Summary Trial. The option, if I may be allowed to call it so, belongs to the Crown or to the magistrate, but the magistrate, who may use his right to exercise an absolute jurisdiction under articles 773 and 774, C.C., if he wishes, must so declare, in so many words.

We do not find anything of the kind of record; neither in the complaint, nor in the conviction; nor in the *procès-verbal* of proceedings, wherein very naturally such assertion of jurisdiction by the magistrate should be found.

As the recorder has not seen fit to express the aforesaid absolute jurisdiction before mentioned which would have precluded the accused from appealing from the said convictions we cannot but recognize to the accused their general right of appeal which is granted to them under article 749 of Part XV. relating to Summary Convictions.

On the merits, I find that the proof of prostitution is not sufficient.

It was easy for the police to prove facts of that nature which might have taken place in the house in question and which would have gone to shew that either article 228 or 238 or 239 applied.

Also, I must mention that under the new article 239, as amended by 3 & 4 Geo. V., ch. 13, the convictions would be excessive as regards the accused, who had been brought before the Court for having frequented the said house. Article 1035, C.C., cannot be made applicable to them, it is needless to say.

Upon the whole, I declare that the present cases are appealable; I maintain the appeals and quash the convictions.

Convictions quashed.

[COURT OF KING'S BENCH, QUEBEC.]
(APPEAL SIDE.)

BEFORE SIR HORACE ARCHAMBEAULT, C.J. AND LAVERGNE,
CROSS, CARROLL AND GERVAIS, J.J.

REX v. DAIGLE.

. FALSE PRETENCES (§ 1—8)—ELEMENTS OF OFFENCE—FRAUDULENT CONTRACT—PRETENDED STOCK SUBSCRIPTION.

A charge that the accused through false pretences induced the complainant to subscribe for shares and thereby obtained a promissory note and cash in payment therefor is within Code sec. 405 as charging that the security was obtained through the pretence of a contract fraudulent in fact.

. CRIMINAL LAW (§ II A—31)—PRELIMINARY ENQUIRY—REPLACEMENT OF MAGISTRATE.

The justice of the peace who issues a warrant of arrest to bring the accused in custody for a preliminary enquiry has the right to order him to appear before himself or any other justice or magistrate having jurisdiction in the district, and the enquiry may, therefore, be taken in such case before another magistrate who replaces the first.

3. CRIMINAL LAW (§ II B—48)—RIGHTS OF ACCUSED—WAIVER—CONSENT TO ADMIT DEPOSITIONS IN TRIALS OF OTHERS SIMILARLY CONCERNED.

The accused may make a minor confession while not fully confessing his guilt and in view of this and of Cr. Code 978 it is not error to admit either at the preliminary enquiry or at the trial depositions in similar concurrent prosecutions of others for fraudulent stock subscriptions in the same company, where the same counsel acting for all of the accused signed a consent by which the evidence at the preliminary inquiry against any one of them might be used as against any other both at the several preliminary enquiries and upon the trials.

[See also *R. v. Brooks*, 11 Can. Cr. Cas. 188, 11 O.L.R. 525.]

4. INDICTMENT, INFORMATION AND COMPLAINT (§ IV—70)—QUASHING—INFORMATION TREATED AS FORMAL CHARGE OR INDICTMENT—SPEEDY TRIAL.

Where the information on which the preliminary enquiry proceeded is used in place of a formal indictment or "charge" on a speedy trial, and the accused moves to quash it as such, he thereby treats it as a *de facto* indictment and cannot object to the lack of a formal document, at least where no prejudice is shewn.

5. BAIL (§ I—25)—CRIMINAL LAW—DIRECTION FOR BAIL IN LIEU OF COMMITTAL FOR TRIAL—RECORD.

Where an order is made on a preliminary enquiry that the accused give bail under Code sec. 696 to appear for trial, but no committal for trial is made as the magistrate does not consider the case sufficiently strong to order committal, the recognizance of bail acknowledged before the magistrate or two justices and duly signed, is the only necessary record to go before the trial Court with the depositions and information; and a speedy trial without jury on defendant's subsequent election of same is not annulled by the lack of a formal order signed by the magistrate to further evidence the direction to give such bail.

6. CRIMINAL LAW (§ II A—49)—ELECTING TRIAL WITHOUT JURY—ACCUSED NOT COMMITTED FOR TRIAL BUT BAILED TO ANSWER TO JURY COURT.

On the order being made under Code sec. 696 that the accused shall give bail to answer any indictment at the jury court upon the charge, in lieu of a committal for trial thereon, the accused may, without waiting for an indictment, elect speedy trial without a jury upon the charge.

DECIDED: May 2, 1914.

CROWN case reserved upon a conviction for obtaining money and a promissory note by false pretences.

The conviction was affirmed.

M. K. Laflamme, K.C., for the accused.

Aimé M. Dechêne, for the Crown.

The opinion of the Court was delivered by

GERVAIS, J.:—Having heard the Crown prosecutor for the District of Kamouraska, as well as the attorney for the accused

upon his application for the opinion of this Court on divers questions of law which were reserved for such opinion by the Court below, sitting at Fraserville, during the trial of the accused on the charge of obtaining by false pretences, in the fall of 1912, a sum of money and a promissory note, through a contract of subscription for shares in a phantom joint stock company; having examined the record and upon the whole having deliberated;

Seeing that, on the 22nd day of October, 1913, after his motion to quash the indictment had been dismissed by the Court of the Sessions of the Peace for the District of Kamouraska, the accused applied to the same, on the 23rd of October, 1913, to reserve to this Court, for its opinion, several questions of law in virtue of Article 1014, C.Cr.;

Seeing that the Court of Special Sessions, after having dismissed, on the 22nd day of October, 1913, the first motion of the accused, postponed his trial; and then closed it, on the 23rd day of October, 1913, declaring him guilty of the charge brought against him, and condemning him to six months in the jail of the District of Kamouraska, and finally, on the 25th of November, 1913, the Court below reserved for the decision of this Court divers questions of law which will be explained later on.

Seeing that it is necessary to understand the case that it be alleged, at once, that, even before that date, Justice of the Peace Dugal had issued his warrant of arrest, on the 29th of November, 1912, against the accused; that after the arrest of the latter the said Justice of the Peace had admitted him to bail "upon the condition for him to appear before the said Justice of the Peace or any such other Justice of the Peace for the District of Kamouraska"; that Mr. C. Panet-Angers, Police Magistrate for the district aforesaid, had already, during the month of January, 1913, held the preliminary investigation which was closed on the 14th March, 1913, by an order for recognizance of bail to surrender, but without any commitment, to the Court of King's Bench for the District of Kamouraska; as the whole is shewn by the *procès-verbal* of hearing properly signed or initialled by the said Magistrate or the Clerk of the Crown (Mr. Pelletier); as well as by the Bail Bond, dated 14th March, 1913, signed by the accused and the said Magistrate, in accordance with Article 696, C. Cr.; that Mr. Corriveau, District Magistrate, had granted the option of the ac-

cused for a trial without jury; that the said trial had been postponed, on several occasions, to be closed, on the 23rd October, 1913, by Mr. Magistrate Langelier, Judge of the Special Sessions of the Peace for the said district, who, after trial, as we have already said, found the accused guilty and convicted him, as above said;

Seeing that the charge against the accused was substantially identical with three others brought, to wit; against Pierre M. Gauthier, Oscar Duchesne, and Joseph Gamache, for having obtained, in the same way, similar valuable securities, to wit a sum of money and a note in settlement, from divers parties, in the fall of 1912; that, against each of them, a similar series of judicial proceedings had been had in each case, resulting as in the present one, in a conviction of six months in the said jail;

Seeing that the said accused got themselves all admitted to bail, in the course of their trials, that they are still at liberty;

Seeing that, on the 22nd October, 1913, the attorney for the accused, acting for each one of them, signed a consent, under which the evidence, in the case of Daigle and of the others, at the preliminary investigation, would be made use of at his trial without jury, of the said case, as well as at the preliminary investigation and also on the merits in the three cases of Gauthier, Duchesne and Gamache, and vice versa;

Seeing that it is under these circumstances that the accused made his motion, dated 23rd October, 1913, to the Court of Special Sessions of the Peace for the District of Kamouraska to be allowed to ask this Court to give its opinion on the following questions:

1. Does the indictment contain the necessary elements to constitute the offence of obtaining money and valuable securities by false pretences with intent to defraud?

2. Has the accused been properly indicted, as the so-called indictment is null for the following reasons:—

- (a) Has not the Magistrate violated the law by allowing as depositions for the benefit of the Crown, those of witnesses who have never been heard in this case but in some other case, that is, in the other cases already mentioned.

- (b) Are not those depositions useless, as there is nothing to shew therein that they have been taken in the presence of the accused.

- (c) Is not the order of recognizance of bail to the Court of King's Bench null, as it is not signed by the Magistrate and does not disclose the charge upon which the accused is held?

3. Were not those objections properly raised, on the 22nd October, 1913, by way of a motion to quash.

4. Does not the accused suffer a prejudice by the dismissal of said motion?

5. Was not the amendment to the indictment, viz: to alter dates, illegal, as the Magistrate being powerless to grant it, being not one appointed specially for the District of Kamouraska, wherein the offence had been committed?

Seeing that the Court of Special Sessions for the District of Kamouraska, while wishing to grant the demand of the accused has formulated them by its Order, dated 25th November, 1913, as follows:—

1. Does a promissory note constitute a valuable security in accordance with sec. 7, sub-sec. 40 of C.Cr.?

2. Did the Justice of the Peace who issued the warrant of arrest and left it to another Magistrate to execute all the proceedings at the preliminary investigation act illegally?

3. Were the depositions illegally taken in the absence of the accused, but under his consent?

4. Were the accused to be committed or could the Magistrate in virtue of Article 696 of C.Cr. just send them, without any commitment, to the Court of King's Bench upon their giving recognizance of bail under the said article?

Seeing that all these questions of law as they have been formulated lack clearness;

Considering, nevertheless, that they are the only questions of which this Court can take cognizance; that the accused cannot be prejudiced thereby; that the clearness and precision of these questions can be obtained by perusing the motion to have the opinion of this Court, dated 23rd October, 1913, as well as by taking communication of the defendant's factum, dated 14th April, 1914, and the said questions could be reduced to the following:—

1. Does the indictment allege an infraction of false pretences?

2. Does the replacement of Justice of the Peace Dugal, who issued the warrant of arrest, by Mr. District Magistrate Panet-Angers, who held the preliminary investigation, by Mr. Magistrate Corriveau, who received the option for trial without jury; by Mr. Justice Langelier, Judge of the Sessions of the Peace, who held the trial, and gave the conviction, make the latter incompetent to make such trial and to give such conviction?

3. Did the attorney for accused act illegally by consenting to the use of the depositions taken in other cases?

4. Could the accused accept the complaint in place of an indictment?

5. Was the Magistrate at the preliminary investigation under pain of nullity bound to sign himself the order of recognizance of bail to surrender to the Court of King's Bench, or could he let the same be signed by the Clerk of the Crown, when the accused afterwards appeared before the Court of Special Sessions to make his option for a trial without jury, in accordance with the bail bond dated 14th March, 1913?

6. Can the accused renounce to a jury trial after the order of recognizance of bail to surrender to the Court of King's Bench, but before or without any commitment or appearance before that Court, upon a regular indictment?

Passing judgment upon the first question:—

Seeing that the Crown has charged the accused with having, through false pretences, induced the complainant, one Belle, to subscribe for shares in the capital stock of The American Shoe and Counter Company, and to have, thereby, received on account some money, and to have thereby also obtained a promissory note in settlement of payment of the balance for the said shares from the same complainant; seeing that if we interpret, in good faith, the words used, in the complaint, in accordance with French or English etymology, we have to come to the conclusion that the complaint does disclose against the accused the facts that he has gotten two things which can be stolen, to wit: two valuable securities, to wit; a sum of money and a note, through the pretence of a fraudulent contract; that is to say, the promise on behalf of Belle to pay, without cause or consideration, the amount of certain shares in the said joint stock company;

Seeing that the general averment of false pretences, right at the beginning of the phrases, which enunciates the infraction, makes it clear that the accused has used false pretences to obtain both the said subscription and thereby the said money and note;

Considering that "to obtain payment of a security through fraud" implies a realization just as perfect, if not more so, than the obtaining of the same;

Considering that the complaint alleges all the essential elements imposed by the Criminal Code to constitute the infraction of false pretences;

Seeing Article 405, C.Cr.:—

The majority of the Judges of this Court answer affirmatively to the first question, Mr. Justice Cross is dissenting.

Passing judgment upon the second question relating to the replacing of Magistrates:—

Seeing that the accused has appeared, according to the condition of his bail bond before Mr. Magistrate Panet-Angers, having the jurisdiction of two Justices of the Peace for the District of Kamouraska in accordance with Article 823, C.Cr.;

Considering that a Justice of the Peace who issues a warrant of arrest against an accused has always the right to order him to appear before himself or any other Justice of the Peace for the said district; that the continuation of proceedings is allowed before another Justice of the Peace, or Magistrate;

Seeing Article 680 and 831, C.Cr.;

The Court unanimously answer in the negative to the second question.

Passing judgment upon the third question with regard to the illegality of the consent of the accused to the admission of depositions given in other cases, but in accordance with the law;

Considering that an accused may always confess his guilt in full, and *a fortiori* make a minor confession; Seeing Article 978, C.Cr.;

The Court unanimously answer negatively to the third question.

Adjudicating upon the fourth question with regard to the absence of a regular indictment:—

Seeing that the accused has renounced to a jury trial before the commencement of the same, or time fixed for the preparation of such procedure;

Seeing that the accused in pursuance of his own demand to quash the indictment admits *de facto* as an indictment, under Article 872, C.Cr., the complaint, the nullity of which this Court is asked to pronounce upon, not as an act of indictment, but as an act of complaint, as not implying the essential elements of an infraction of the law for false pretences;

Seeing that the accused has proven no prejudice, under this head;

Seeing Articles 825, 828, 1019, C.Cr., the Court unanimously answers in the affirmative to this question;

Passing judgment on the fifth question:—

With regard to the lack of signature at the close of the preliminary investigation on the part of the Magistrate ordering the recognizance of bail by the accused to surrender to the Assize Court;

Seeing that there has been, in this case, no order of commitment, in accordance with Article 690, C.Cr., but simply an order of recognizance of bail by accused to surrender to the Court of King's Bench, under Article 696, C.Cr., which implies merely, in such a case, the obligation of giving a bond;

Seeing that the rendering of the said order results from the signature, on the 14th of March, 1913, by the accused and the said Magistrate Panet-Angers holding the said preliminary investigation and ordering the said bail bond, on behalf of the accused and his bondsmen, that he would appear during the following term of the Court of King's Bench to be tried for his said offence;

Seeing that the accused has appeared, afterwards, in August, 1913, in compliance with the said order to renounce to his jury trial, notwithstanding any so-called informality;

Considering that there is a distinction to be drawn between the said two orders; that the said Magistrate Panet-Angers had not to sign any order of commitment but simply a bond which he did, on the 14th day of March, 1913;

Seeing Articles 690, 696, 824, 1019, C.Cr.;

The Court unanimously answer negatively to this question.

Passing judgment upon the sixth question with regard to the renunciation by the accused to a jury trial, before any commitment or drafting of an indictment, or appearance before the Assize Court:—

Seeing that the option for a jury trial has taken place in proper time before the opening of the Assize Court, with the permission of a competent Judge, and the formalities required by law, together with the full consent of the accused, in the presence of his lawyer, who has then and there given his written consent to use, in each of the four trials, as complete evidence, the depositions of the witnesses used in any one of the other trials;

Considering that the accused has not suffered any prejudice therefrom;

Considering that the recent amendment to the Criminal Code has abolished, when the accused so demands it, the formalities of the commitment to the Assize Court, as well as the notice to the Sheriff for an option of a trial without jury, and finally that of the return of the accused before a competent Judge to hold a speedy trial;

Seeing Articles 825, 826, 827, 828, C.Cr.:

The Court unanimously answers in the affirmative to this question.

And the majority of the Judges of this Court doth order in consequence, that the *acte* of its present answers, after being duly registered and docketed in its records, be sent with the record of the present case, to the said Court of Special Sessions of the Peace for the District of Kamouraska; leaving it to the latter to deal ultimately with the execution of the said sentences.

Conviction affirmed.

N.B.—A similar judgment was rendered in each of the three cases of Pierre M. Gauthier, Oscar Duchesne and Joseph Ganache.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE SIR CHARLES TOWNSEND, C.J., GRAHAM, E.J., AND
MEAGHER, LONGLEY AND RITCHIE, JJ.

REX v. HAYNES.

1. TRIAL (§ III E 5—260)—HOMICIDE—INSTRUCTION TO JURY—PRISONER'S LETTER REQUESTING FALSE ANSWER TO ENQUIRY—EXPLAINING POSSESSION OF MONEY.

On the trial of a murder charge the construction of a letter written by the accused and placed in evidence is for the Judge and not for the jury, and where the letter itself is a request to make false statements in aid of his defence, the trial Judge may tell the jury that they should take into consideration the prisoner's action in endeavouring to manufacture evidence to mislead the Court by concocting the scheme as disclosed in his letter, to account for the money found on him.

2. TRIAL (§ III E 5—261)—CRIMINAL CASE—INSTRUCTION—INACCURACY IN JUDGE'S CHARGE—PREJUDICE.

A slight inaccuracy in the Judge's charge to the jury in referring to certain evidence as having been given at the preliminary enquiry whereas it was in fact given at the trial itself, and the depositions at the preliminary enquiry were not then put in as evidence, but the preliminary enquiry was referred to in the testimony, will not constitute a ground for setting aside a conviction, where the inaccuracy could not have prejudicially affected the prisoner.

DECIDED: April 28, 1914.

CROWN case reserved. The prisoner was indicted for the murder of Benjamin Atkinson by the grand jury for the county of Cape Breton and was tried before Drysdale, J., and a petit jury and was convicted.

Application was made to the learned Judge to reserve a case for the opinion of the Supreme Court *en banc* on a large number of grounds, and after hearing counsel he declined to reserve any question except as to whether in the charge as a whole there was misdirection in law. Subsequently, on further application he amended the case reserved so as to include the following grounds:

1. Whether the direction in regard to circumstantial evidence, viz.: "You have certain proved facts and you ask yourself what is the reasonable inference from these facts and you act on that opinion" was correct, and whether such direction was lacking in completeness and liable to mislead the jury?

2. Whether the direction that "Mrs. Atkinson, at the preliminary trial, when Haynes was accused of murder, goes on the stand and swore that she

never saw him again until he arrived in Sydney, and when faced with the telephone girls," was not incorrect and calculated to mislead the jury?

3. Whether the direction that "the letter written to Dolly Bownds is a crime in itself" was correct and was not liable to mislead the jury?

4. Whether the direction that he (Haynes in writing the letter to Dolly Bownds) was concocting a scheme to account for money found on him was correct and was not calculated to mislead the jury?

5. Whether the direction that an alibi means proof of absence of the accused at the time the crime was committed was correct?

6. Whether the direction that alibi here means proof of the accused being here in Sydney at the hour he is alleged to have committed the crime is correct and was not calculated to mislead the jury?

7. Whether the direction, "you have certainly to take into account his action of making false testimony in this," was correct, and was not asserting as a proven fact what it was solely the province of the jury to determine?

The material portions of the evidence are set out fully in the judgment of Graham, E.J.

A. D. Gunn and B. W. Russell, for the prisoner.

S. Jenks, K.C., Deputy Attorney-General, and *D. Hearn*, K.C., for the Crown.

SIR CHARLES TOWNSHEND, C.J.:—The learned trial Judge, having amended the reserved case so as to be satisfactory to the Court and counsel on both sides, I deal with the questions reserved for the opinion of the Court in their order.

The first point, as to whether the trial Judge's direction in respect to circumstantial evidence was complete, and whether it might have misled the jury, was not seriously argued before us, as indeed it could not be after perusing the whole charge which completely disposes of any such ground.

As to the second, the reference to Mrs. Atkinson's testimony at the preliminary hearing when the depositions were not in evidence, it is a sufficient answer that the same evidence was given at the trial before the Court and jury when Mrs. Atkinson admitted that she had made false statements, to which the Judge referred, the only difference being that she did not say it "when faced with the telephone girls," but this omission in no way affected the evidence as given at the preliminary investigation, and at the trial before the Court. The learned Judge, in stating

the fact, merely erred in saying at the preliminary trial, instead of the trial then proceeding. It could in no way have prejudicially affected the prisoner, as the whole importance of the evidence was, in both trials or hearings, she had stated a fact which she admitted afterwards was not true.

The third and fourth points are practically the same, whether the trial Judge was correct in saying that the letter written to Dolly Bounds was a crime in itself and that Haynes, in writing the letter, was concocting a scheme to account for money found on him.

Taking the whole facts in evidence I should say that the comments of the learned Judge on this letter were perfectly in order, and the observation, such as any Judge should have made on this trial. That the prisoner had written the letter after his committal to jail on the charge of this murder was not in dispute, and no one could read its contents without seeing at once that he was concocting a scheme to mislead the Court on his trial, and the fact of his attempting to do so, was, the Judge stated, a crime in itself. There could be no doubt as to the object of the letter, as it tells its own tale, and, as pointed out, was an important factor in the trial which the learned Judge properly placed before the jury. Moreover, the construction of a written document, except in cases of libel, is for the Judge and not the jury.

As to the 5th and 6th grounds, whether the Judge properly instructed the jury on the question of what is meant by proof of an "alibi," I am quite unable to appreciate the difficulty suggested. The defence, in proof of it, was, that the prisoner was in Sydney at the time the crime was committed. The learned Judge, instructing the jury as to what an "alibi" consisted of, says:—

"An alibi means proof of the absence of the accused at the time the crime is supposed to be committed, satisfactory proof that he is in some place else at that time." Then he adds, that in this case it means proof that he was in Sydney at the hour he is alleged to have committed the crime. This was the very contention of the prisoner, and he brought witnesses to prove such was the case, surely it was his duty to instruct the jury exactly as he did, and no misconception could exist among intelligent men as to the meaning of proving an alibi.

The last point made is hardly worthy of notice, and was not particularly urged, but I should remark that it was eminently proper that the Judge tell the jury that in coming to a conclusion, they should take into consideration the accused's action in making false testimony, that is, endeavouring to manufacture evidence to mislead the Court.

For all these reasons, I am of opinion that the accused is not entitled to a new trial on any of the grounds set forth, and that the conviction should be affirmed.

GRAHAM, E.J.:—This is a case reserved upon a conviction of murder.

The body of Benjamin Atkinson, the deceased, was found on McQueen's road, about five miles from Sydney.

The evidence tends to shew that he received a blow on the head with a stone, which caused his death. The stone and pools of blood and his false teeth were found in the woods some sixty-four feet from where the body was found on the road and the theory of the Crown is, that it was brought there to lend plausibility to the appearance of an accidental death.

I am quite satisfied that it was not an accidental death. The medical experts shew that.

It appears that the deceased had driven out from Sydney to Front Lake on this road that afternoon, and having taken supper with his wife and his brother-in-law, who were camping out there, and two others, he was returning to Sydney alone in his carriage. A short time after he left, one Duncan Rory McQueen met the horse and carriage on the road, the reins dragging, but no one in the carriage. Two persons drove out to see if there had been a accident and the horse shied as he came to the body of the deceased, lying partly on the road, dead.

The next step in the proof as to whether it was the defendant who killed the deceased, depending almost wholly on circumstantial evidence, is more perplexing. The defendant was acquainted with the deceased's wife and brother-in-law, who had met him abroad and, in fact, he had come to Sydney at their instance.

I shall deal with this evidence as it is quoted in the summing up.

At any rate he had been out in the locality of the camp on two or three different occasions. Near to the place where the pools of blood were found, were found some bits of paper, which turned out to be the cover of a magazine with the name of Goodwin upon it. Goodwin had left this magazine in his room at a lodging house in Sydney, and the defendant also had a room in the same lodging house.

Then after the prisoner was arrested, a fragment from a wasp's nest was found attached to a pair of trousers of his, and out at the locus there were the remains of a wasp's nest.

I have read the evidence of Bryant, and I am not myself very well persuaded from the mode of the production by him of the fragment from the wasp's nest that the connection between it and the trousers can be absolutely depended upon. But, of course, that is for the jury.

But the most damaging circumstance is, that when the prisoner was arrested, there was on his person the sum of \$110, and for some time before this he had been borrowing small sums of money, and he cannot give any account for the possession of this money. In fact, it must have struck him as a very suspicious circumstance against him, because he took part in a scheme which would account for the acquisition of this money and the scheme failed.

He wrote what is called the Dolly Bounds letter to Los Angeles in California, and it was returned by the Chief of Police at that place to the Crown Prosecutor. It is as follows:—

My dear Dolly,—I am in a whole lot of trouble, and was arrested on August 28th, as a *murder* suspect in this *place*. I was (never) so surprised in my *life* and just because I was walking several times in that part of the country. You know why I left L. A. and why I wanted to get away as far as possible. I had intended coming back on the 29th or leaving here on that date, and now this terrible charge was placed against *me*. Dollie, before my God, I did not have anything to do with *this*, and as I am away from friends and no money, I am locked up in the *county jail* and the days are awfully long, and you know, dear, how I worry. I am nearly crazy. You know, dear, we have been the best of friends for twelve years, and we were true friends at that, and our meeting in L. A. again was sweet to me, and, Dolly, I know you will do anything in your power for me, as far as you can and I am going to ask you one now, and it is wholly within your power to help me to get clear of this, and what I want you to do is this. If anyone should write and ask you if you sent me any money.

say *yes*, you sent me \$150 by letter and I should have received it about the 17th or 18th of August, and that you mailed it to me in "*bills*," and *did not register it*, and if they ask you what kind of bills, 10's and 20's, and that you sent it from Seattle and that it was *Canadian money*.

I don't think they will ask you what kind of money, but be prepared if they do.

The reason of all this is, they think this man was murdered and that I was *hired* to do it.

It is about killing me, dear, and if you can aid me this *much* I can make my case pretty clear. Won't you do this for me, dear, for *God's sake* help me this much. I am about crazy with this *jail*. You know I would not harm a *kitten* and I never spoke ill of anyone in my life, and as soon as you receive this please wire my attorneys here at this place. I have retained them in the case and I believe they are the *best there is*, and as soon as you receive this send a night letter to them saying that you have received a letter (they will write you, too) and that it was all O.K. Please do this, Dollie, and you will *help save me*, and I have every confidence in you and know you will, and that will be all there is to do. For I had nothing to do with this in the world. Also you can say if you are asked that I called you such *pet names as Teen or Patsy and Baby Doll*, won't you? I will send you or have the attorney send you, a transcript of the *evidence*. Also newspapers so you will know as soon as they receive a reply from them. They will want to know where to address a letter when I write you *again*. Don't forget the wire and send it "*collect*."

God bless you, dearie, for I am depending on you. So good-bye, from yours anxiously, Mantalio Fred.

If you think it *wise* you may call upon Miss Style, of Chas. A. McKelery, 207 Citizens' National Bank, L.A. Use your own judgment. Best work fast.

Address, Langille & Maddin, barristers, Sydney, Nova Scotia. Send all correspondence to me through them with an envelope enclosed addressed to me.

The Crown, in order to shew a motive for the killing by the defendant, use the possession of this money by him in two ways. First, the counsel contended that the killing was committed for obtaining money. But I think that theory is very weak. On the deceased's person, when he was found, his brother-in-law Maddin found, besides the watch in his hip pocket, \$130 odd dollars in bills, and some change, in one of the trousers pockets Lowden, the undertaker, also found "in one bunch" in the left-hand front pocket of his trousers \$395 and in his watch pocket \$25.

But there is a second suggestion as to his acquisition of this, and that is that there were improper relations between Mrs. Atkinson and the prisoner and that he was paid the money by her to kill her husband.

This is the way in which the learned Judge at the trial put this suggestion to the jury.

Mrs. Atkinson was next called and told a story some parts of it somewhat extraordinary. Nevertheless I will read what I have taken:—

"Live in Sydney. Ten or twelve years here. I know the prisoner. Met him. Was introduced to me by Mrs. Darnell. I met him several times in San Francisco. Had conversations with him about a mine. He told me what his business was—mining. My brother was a mining man and I got interested. We had a stock about selling stock in a mine. Mr. Haynes and his partner came to Marshfield in Oregon."

The substance of that is, that she met this man in California and then again in Marshfield, Oregon. Then she went to Brandon, a suburb or something like that, two or three hours from Marshfield.

"I got advice from Mr. Laing about the mine and did not buy. Then some oil business came up. It was talked about. About first of April left San Francisco and about first June left Marshfield. Haynes and I were to sell stock, met Haynes next in Winnipeg. This side of the Rockies, getting well into Canada now. Met him at the Royal Alexandra hotel. I had a brother there. It was in June I was in Winnipeg. Haynes was there before me. Came about same time. My brother Charlie lives in Winnipeg. My brother William was taking up lands in Winnipeg. Oil business in Brandon. It was at my suggestion Haynes came to Sydney. I arrived at Sydney about the 27th of July. I stayed in Stellarton. I knew Haynes was here ahead of me. I telephoned to him from New Glasgow in July. I called him at the Central Office."

This is testimony I can't make out. I don't know whether you can or not. This woman met this man in San Francisco, in Marshfield, and had business transactions with him at these places and then in Winnipeg. Then at the preliminary when this man was charged with murder, she goes on the stand, and there, under solemn oath, swears that she never saw him again until she arrived in Sydney. Then when faced with the telephone operators, those people from New Glasgow, she comes back and tells us she forgot it. Although the man is charged with murdering her husband, practically came across the continent—and still she says she forgot she met him in New Glasgow. This is a statement impossible to believe. What it means I know not. You will have to take it. "I said to call him at the 'Queen.' I can't say how I knew he was there. I recommended the 'Queen' to him. I said nothing about a key when telephoning. I telephoned him about a land boom at New Glasgow. I saw Haynes about it in New Glasgow. I met him at 11 a.m. in 'New Glasgow. I was not alone in his presence. He stayed in New Glasgow. I stayed at my old home a week or a few days anyway. He was staying in our house when I came home. I had conversation with him in my house. There was nothing further about oil business here. I did not know he was in the house. I heard about the picking of the locks and spoke to him. When I was in New Glasgow I did not know where he was going. The very first time I spoke to him in the house was perhaps the first or second day. I said to him he was the big man they were talking about, picking locks. He asked me did I want

him to leave the house without clearing himself. I told him he had better go. Haynes told me that he did not touch the locks and asked me if I believed it myself. He went. I spoke to him in the hall after, when he came back for his mail. He left a day or two after. I was sick for a day or so after I came home. I called him once at the Y.M.C.A. He wrote asking for his mail. I only called him once or twice before I went out camping. I never saw Haynes out there. My little girl and Miss Dixon were out with my husband the day of his death. This was the first year we camped out at Front Lake. After the death of Mr. Atkinson I did not see this man. Had no letters from him. Mr. Atkinson left alone. When he drove out I came behind up to John McQueen's. I did not see the remains out there. . . . I went out the road the 15th of August after coming into town."

I omit the cross-examination read to the jury as

Later the learned Judge said:—

You will have to look at the whole situation. It is said there is no motive here. It was argued before you that the motive was not proved. The motive is a material part of the Crown's case, of course, and the motive you very often draw from inferences under the proved circumstances. It is said that this man met this woman and that their relations were such that he desired to get rid of the husband even by taking his life. The charge has gone so far that it has taken formal shape in the way of an information against this woman, which has been dismissed. It has been suggested that the relation between these people was such that he desired to get rid of Atkinson, even by the taking of his life. Now, of course, that is a motive. It is also said that he robbed him. If he did he missed a lot of money. And it is said that he killed him for money. You can only speculate about this motive theory. It is somewhat extraordinary that she met him in New Glasgow and on the preliminary hearing she did not remember that, she could not forget that. I do not believe she forgot it. But she comes back and makes a clean breast of it after she is faced here by the New Glasgow people, and she then says that she did not see him and he came up. They are associated in New Glasgow. She comes home and finds him quartered in the house, in her own hotel. Trouble has arisen and she tackles him at once, tells him he has to go. He goes to the other hotel across the street; and the very day after she moves out to Front Lake settlement, this man begins to frequent the road. It is evident that she moved out and took charge of the tent on the 5th of August. There is a body of testimony, that on the 6th, 7th, 8th, 10th, and 12th, almost every day after Haynes was out in that vicinity and out on the road sometimes under the guise of a wrong name. Nevertheless, he was out there, loafing in that district. Of course, it is suggestive that whenever the woman moved out, he followed. We don't know what their relations were. You will have to speculate about it.

Mrs. Atkinson was a witness called by the Crown.

On her evidence thus given depends the whole case of improper relations between her and the prisoner, and what is a long

step from the existence of improper relations—the payment of money to him to kill her husband or even the killing of her husband. It may be said that is for the jury. True, they may suspect improper relations, but there is no evidence from which improper relations could justifiably be inferred. It will not do to put up a person as a witness, and then say, because that witness has told an untruth, everything denied is untrue, and, therefore, the affirmative must be true, although there is no evidence of the affirmative. And as to the payment of any money by Mrs. Atkinson to the prisoner, there is no evidence whatever to support it. A paramour receiving \$150 from the wife to kill the husband in addition to the gratification of his passions is rather an unusual thing.

I think, with deference, that the jury should have been warned that those inferences were not properly deduceable from the evidence in the case.

Crime is never committed without motive, and hence, on the trial of a person charged with crime, it is always competent to give evidence shewing the motive which induced the criminal act. Where the crime is clearly proved and the criminal positively identified, it is not important to prove motives. But when the case depends on circumstantial evidence and the circumstances point to any particular person as the criminal, the case against him is much fortified by proof that he had a motive to commit the crime. But, I think, that there is a failure on the part of the Crown to prove motive in this case and that it was put to the jury as if there was legitimate proof.

But I believe that this point is not open owing to the way in which the case has been amended at the instance of the Court above requiring specific points to be stated.

The point as stated is as follows:—

Whether the direction that Mrs. Atkinson, at the preliminary trial when Haynes was accused of murder, goes on the stand and swore that she never saw him again until he arrived in Sydney, and when faced with the telephone girls, was not incorrect and calculated to mislead the jury.

It may be that what the learned Judge stated to the jury was not literally before him in the evidence, but I think the effect of the evidence before him justified his interpretation.

This is the stenographic report of the evidence: Mrs. Atkinson (page 305) says:—

Q. You telephoned to him? A. Yes, sir.

Q. From where? A. From New Glasgow. I thought of that before and spoke to counsel before and I thought I should go to Mr. Hearn and tell him about it, and he said he could correct it.

Q. What did you want to correct? A. They asked me if I had any communication with this man and I said no.

Q. I think you could have gone to Mr. Hearn if you wished. You say that when you made that statement that you had no communication with Haynes after you left Winnipeg until you saw him in Sydney that you were mistaken? A. Yes.

Q. And that you did telephone him from New Glasgow? A. Yes, sir. It was in July.

Q. Anything very urgent that you wanted to telephone him? Where did you call him up at? A. I tell you when I got to New Glasgow; there is quite a boom on in New Glasgow.

Q. Where did you call him up at? A. I called him up at the Central office. . . .

Q. I suppose you heard the evidence of the telephone girls at New Glasgow? A. Yes, sir.

Q. That you were talking to him about a key? A. There is nothing about a key in the evidence.

Q. There is nothing about a key in the evidence? A. In our message.

Q. They were mistaken? A. Absolutely, there was no conversation about a key.

Later, she said her niece was with her at New Glasgow, that the prisoner came there at 11 o'clock, they talked over the business of property in New Glasgow and he returned to Sydney at five o'clock, and she went to her former home at Westville, and afterwards returned to Sydney.

However, this evidence clearly referred to what she had formerly said at the preliminary examination. Mr. Hearn, it is shewn, was the magistrate. "Being faced with the telephone operators" clearly refers to their evidence formerly given. It is true it may have been in another preliminary examination, as the defendant's counsel contend. But if that was so, it has not been shewn to us in this case. The learned Judge followed what was stated. It is not shewn that there is anything which can be called a misstatement of fact to the jury.

In respect to the letter written by the prisoner to Dolly Bounds at Los Angeles, to induce her, if an inquiry was made of her to state a falsehood, viz., that she had sent him the money,

which would account for the possession of it by him, the learned Judge, in the summing up, spoke of it as a crime in itself and also as a scheme to account for money found on him and also as making false testimony. The prisoner's counsel complains of this. I am not sure that the writing of this letter was an indictable offence. It was not the fabrication of evidence nor was it an inducement to Dolly Bownds to directly fabricate evidence, she being at Los Angeles and not in any way a probable witness. It rather was an attempt to induce her to throw any police officer, or detective, at Los Angeles, making inquiry of her off the scent, by telling a lie to him. But it was reprehensible and might have led to a crime and, I think, its characterization by the learned Judge, whether technically correct or not, was not very extreme, and the prisoner would not be prejudiced thereby. Its use for the purpose of indicating a presumption that a prisoner, who would do that, might be guilty of the crime charged is usual. Taylor on Evidence, secs. 116, 117.

I do not agree with the interpretation of the letter which the prisoner's counsel contends for, namely, that she may have actually sent him the money and he is refreshing her memory as to the transaction. The part asking her to say she was up near the Canadian boundary, which would account for the possession of Canadian bills which, by the way, was the kind of bills he had in his possession, indicates that he was asking her to indulge in fiction.

A juror asked the learned Judge for an explanation as to the meaning of an alibi. I think the explanation and the illustration quite sufficiently apt. The criticism that it required proof of presence elsewhere at the same identical moment that the crime was committed is far fetched.

In my opinion, the specific questions reserved for our consideration must be answered in a sense unfavourable to the prisoner as I have indicated.

MEAGHER, J., said that the jurisdiction of the Court on a reserved case was statutory and the case could not be enlarged or anything imported into it, but it must be accepted as presented. With reference to the questions raised he thought that

there was nothing in them and that the case reserved must be quashed and the conviction affirmed.

LONGLEY, J., concurred that the application must fail.

RITCHIE, J.:—Haynes has been convicted of the crime of murder, and the learned trial Judge has reserved a case.

The first question is:—

Whether the direction that Mrs. Atkinson, at the preliminary trial, when Haynes was accused of murder, goes on the stand and swore that she never saw him again "until he arrived in Sydney and when faced with the telephone girls" is not incorrect and calculated to mislead the jury.

This reservation is made in the language submitted to the learned Judge by counsel. We were told at the bar that the point desired to be raised was that as a matter of fact there was no evidence in this case that Mrs. Atkinson was "faced with the telephone girls."

I am of opinion that it is not open to the Court to adjudicate upon this question because there is no statement in the reservation as to whether or not there was evidence that Mrs. Atkinson was confronted with the telephone girls. I do not think the Court has jurisdiction to travel outside the reserved case in search for facts, the evidence is not made part of the case. That, however, would not be the proper course. The correct practice is for the Judge to state the effect of the evidence in the reservation. In *The King v. Cohon*, 6 Can. Cr. Cas. 393, the learned Chief Justice of this Court said:—

I may add in conclusion, that it is not competent for the Judge below to submit such a question as the last, whether there is any legal evidence to sustain the conviction and send up the whole evidence for us to review. He may state the effect of evidence given to sustain a certain charge or give the material part of it, and reserve a question as to its sufficiency in point of law to convict, but it certainly was never contemplated that he could send up the whole body of evidence, and asks if that evidence is sufficient to convict.

In *The Queen v. Giles* (1894), 31 C.L.J. 33, the form of reservation was as follows:—

Having regard to the evidence and the provisions of the said sections and also the provisions of section 204 of the said Code, ought the defendant to have been convicted?

Chancellor Boyd said:—

We cannot agree to proceed in this case. It must be remitted to the Judge to be restated. The Judge must find the facts and specify the questions of law as to which he is in doubt and reserve for our own judgment.

I also refer to *The King v. Fortier*, 7 Can. Cr. Cas. 423.

If I could see any possibility of prejudice to Haynes by the direction complained of, I would be in favour of remitting the case to the learned Judge for amendment, but I see no such possibility. The sole point which was being made to the jury in that part of the charge here complained of was, that it was impossible to believe that Mrs. Atkinson had forgotten that she met Haynes in New Glasgow.

I entirely agree that it is not possible to believe that statement, and I cannot see that the remark about the telephone girls could in any way prejudice the prisoner, entirely apart from it, the fact remains, that she did swear that she had forgotten as to the meeting with the prisoner in New Glasgow, and that was the thing which the Judge was, as I think, properly drawing the attention of the jury to.

In regard to the other points reserved, I am of opinion that none of them are well taken. It is not necessary for me to add anything to that which the learned Chief Justice has said in regard to them.

Conviction affirmed.

[SUPREME COURT OF CANADA.]

BEFORE SIR CHARLES FITZPATRICK, C.J., AND DAVIES, IDINGTON,
DUFF AND ANGLIN, JJ.

QUONG WING v. THE KING.

1. CONSTITUTIONAL LAW (§ II B—325)—REGULATION OF BUSINESS—EMPLOYMENT OF WHITE FEMALES IN PLACES OF BUSINESS OF CHINESE OR OTHER ORIENTALS—PROVINCIAL LAW PROHIBITING WITH PENALTIES.

Chapter 17 of the Sask. statutes, 1912, 2 Geo. V. (Sask.) ch. 17, prohibiting the employment of white women in any restaurant, laundry, or other place of business or amusement which is kept, owned or managed by a Chinaman, Japanese or other Oriental person, is

not *ultra vires*, although it imposes fine and imprisonment for its infraction.

[*Re v. Quong Wing*, 21 Can. Cr. Cas. 326, 12 D.L.R. 656, 49 C.L.J. 593, affirmed; *Union Colliery Co. v. Bryden*, [1899] A.C. 580, *Cunningham v. Tomey Homma*, [1903] A.C. 151, and *Re McNutt*, 21 Can. Cr. Cas. 157, 47 Can. S.C.R. 259, 10 D.L.R. 834, referred to.]

2. ALIENS (§ II—13)—NATURALIZATION—EFFECT—DISCRIMINATION AS TO CIVIL RIGHTS.

Notwithstanding his naturalization in Canada a man born in China and of Chinese parents is a "Chinaman" within the meaning of the statute 2 Geo. V. (Sask.), ch. 17, prohibiting employment of white women in restaurants and other places of business kept by "a Chinaman."

ARGUED: February 12, 1914.

DECIDED: February 23, 1914.

APPEAL from the judgment of the Supreme Court of Saskatchewan, *R. v. Quong Wing*, 12 D.L.R. 656, 21 Can. Cr. Cas. 326, 49 C.L.J. 593, upon a case stated by the police magistrate of the city of Moose Jaw, Sask., upon the conviction by him of the appellant on a charge of employing white females in contravention of the provisions of the Saskatchewan statute, 2 Geo. V. ch. 17.

The appeal was dismissed, Idington, J., dissenting.

The judgment of the Supreme Court of Saskatchewan affirmed the conviction.

The case stated by the police magistrate was, as follows:—

"In the matter of the Act respecting the employment of female labour in certain capacities, being chapter seventeen (17) of the statutes of Saskatchewan, 1912, and a certain conviction of Quong Wing thereunder made by W. F. Dunn, police magistrate in and for the city of Moose Jaw, in the province of Saskatchewan on the twenty-seventh (27th) day of May, 1912, on the information of W. P. Johnson, chief of police in and for the city of Moose Jaw.

"Case stated by W. F. Dunn, police magistrate in and for the city of Moose Jaw under the provisions of the Criminal Code of Canada in that behalf.

"On the twenty-first (21st) day of May, 1912, an information was laid under oath before me by the above-named W. P. Johnson for that the said Quong Wing on the twentieth (20th) day

of May, 1912, at the city of Moose Jaw, in the Province of Saskatchewan, he being a Chinaman and the owner, keeper or manager of a place of business, known as the 'C. E. R. Restaurant,' in the city of Moose Jaw, did employ in the said restaurant, as waitresses, two white women, to wit, one Mabel Hopham and one Nellie Lane, contrary to the Act respecting the employment of white female labour in certain capacities, being chapter seventeen (17) of the statutes of Saskatchewan, 1912. On the twenty-seventh (27th) day of May, 1912, the said charge was duly heard before me, the said information having been first amended by striking out the words 'or manager' and substituting in the place thereof the word 'and' so as to make the information read 'owner and keeper' after which the said information was re-sworn, in the presence of both parties and after hearing the evidence adduced and the statements of the said W. P. Johnson and Quong Wing and their counsel I found the said Quong Wing guilty of the said offence and convicted him therefor, but, at the request of the counsel for the said Quong Wing I state the following case for the opinion of this honourable Court.

"I find on the evidence:—

"1. That the accused Quong Wing was born in China and of Chinese parents.

"2. That the said accused was on the date of the alleged offence a naturalized British subject.

"3. That on the twentieth (20th) day of May, 1912, the said accused was the keeper of a restaurant known as the 'C. E. R. Restaurant' in the city of Moose Jaw, in the Province of Saskatchewan.

"4. That on the said twentieth day of May, 1912, the said accused had in his employ as waitresses in the said restaurant one Mabel Hopham and one Nellie Lane, and that the said Mabel Hopham and Nellie Lane are white women.

"The counsel for the said Quong Wing desires to question the validity of the said conviction on the following grounds:—

"1. That it is erroneous in point of law.

"2. That the said Act, chapter seventeen (17) of the statutes of Saskatchewan, 1912, is *ultra vires*.

"3. That the Court had no jurisdiction.

The questions submitted for the judgment of this honourable Court being:—

1. Whether the premises described as being the place in which the alleged white women worked is included in the Act under which the information was laid.
2. Whether any offence under the said Act is disclosed.
3. Whether the accused, being a naturalized British subject, is one of the persons prohibited by the Act from employing female labour.
4. Whether the said Act under which the said information was laid is *ultra vires*.
5. Whether the conviction was in excess of the jurisdiction of the Court.

G. F. Henderson, K.C., for the appellant.

J. N. Fish, K.C., for the respondent.

FITZPATRICK, C.J.:—The appellant, a Chinaman and a naturalized Canadian citizen, was convicted of employing white female servants contrary to the provisions of chapter 17 of the statutes of Saskatchewan, 1912, and, for his defence, he contends that the Act in question is *ultra vires* of the provincial legislature.

It is urged that the aim of the Act is to deprive the defendant and the Chinese generally, whether naturalized or not, of the rights ordinarily enjoyed by the other inhabitants of the Province of Saskatchewan and that the subject-matter of the Act is within the exclusive legislative authority of the Parliament of Canada.

The Act in question reads as follows:—

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bona fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman.

2. Any employer guilty of any contravention or violation of this Act, shall, upon summary conviction be liable to a penalty not exceeding \$100 and, in default of payment, to imprisonment for a term not exceeding two months.

In terms the section purports merely to regulate places of business and resorts owned and managed by Chinese, independent of nationality, in the interest of the morals of women and girls in Saskatchewan. There are many factory Acts passed by

provincial legislatures to fix the age of employment and to provide for proper accommodation for workmen and the convenience of the sexes which are intended not only to safeguard the bodily health, but also the morals of Canadian workers, and I fail to understand the difference in principle between that legislation and this.

It is also undoubted that the legislatures authorize the making by municipalities of disciplinary and police regulations to prevent disorders on Sundays and at night, and in that connection to compel tavern and saloon keepers to close their drinking places at certain hours. Why should those legislatures not have power to enact that women and girls should not be employed in certain industries or in certain places or by a certain class of people? This legislation may affect the civil rights of Chinamen, but it is primarily directed to the protection of children and girls.

The Chinaman is not deprived of the right to employ others, but the classes from which he may select his employees are limited. In certain factories women or children under a certain age are not permitted to work at all, and, in others, they may not be employed except subject to certain restrictions in the interest of the employee's bodily and moral welfare. The difference between the restrictions imposed on all Canadians by such legislation and those resulting from the Act in question is one of degree, not of kind.

I would dismiss the appeal with costs.

DAVIES, J.:—The question on this appeal is not one as to the policy or justice of the Act in question, but solely as to the power of the provincial legislature to pass it. There is no doubt that, as enacted, it seriously affects the civil rights of the Chinamen in Saskatchewan, whether they are aliens or naturalized British subjects. If the language of Lord Watson, in delivering the judgment of the Judicial Committee of the Privy Council in *Union Colliery Company of British Columbia v. Bryden*, [1899] A. C. 580, was to be accepted as the correct interpretation of the law defining the powers of the Dominion Parliament to legislate on the subject-matter of "naturalization and aliens" assigned

to it by item 25 of section 91 of the British North America Act, 1867, I would feel some difficulty in upholding the legislation now under review. Lord Watson there said, at page 586:—

But sec. 91, sub-sec. 25, might, possibly, be construed as conferring that power in case of naturalized aliens after naturalization. The subject of “naturalization” seems, *prima facie*, to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term “naturalization” was intended to bear, as it occurs in sec. 91, sub-sec. 25. But it seems clear that the expression “aliens,” occurring in that clause, refers to and, at least, includes all aliens who have not yet been naturalized; and the words “no Chinaman,” as they are used in section 4 of the provincial Act, were, probably, meant to denote, and they certainly include every adult Chinaman who has not been naturalized.

And, at page 587:—

But the leading feature of the enactments consists in this—that they have, and can have no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.

Their Lordships see no reason to doubt that, by virtue of sec. 91, sub-sec. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and, therefore, trench upon the exclusive authority of the Parliament of Canada.

If the “exclusive authority on all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada” is vested in the Dominion Parliament by sub-sec. 25 of sec. 91 of the B.N.A. Act, 1867, it would, to my mind, afford a strong argument that the legislation now in question should be held *ultra vires*.

But in the later case of *Cunningham v. Tomey Homma*, [1913] A.C. 151, the Judicial Committee modified the views of the construction of sub-sec. 25 of sec. 91 stated in the *Union Colliery* decision. Their Lordships say, at pages 156-157:—

Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the

mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of sec. 91, sub-sec. 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It, undoubtedly, reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

Reading the *Union Colliery* case, [1899] A.C. 580, therefore, as explained in this later case, and accepting their Lordships' interpretation of sub-sec. 25 of sec. 91, that "its language does not purport to deal with the consequences of either alienage or naturalization," and that, while it exclusively reserves these subjects to the jurisdiction of the Dominion in so far as to determine what shall constitute either alienage or naturalization, it does not touch the question of what consequences shall follow from either, I am relieved from the difficulty I would otherwise feel.

The legislation under review does not, in this view, trespass upon the exclusive power of the Dominion legislature. It does deal with the subject-matter of "property and civil rights" within the province, exclusively assigned to the provincial legislatures, and so dealing cannot be held *ultra vires*, however harshly it may bear upon Chinamen, naturalized or not, residing in the province. There is no inherent right in any class of the community to employ women and children which the legislature may not modify or take away altogether. There is nothing in the British North America Act which says that such legislation may not be class legislation. Once it is decided that the subject-matter of the employment of white women is within the exclusive powers of the provincial legislature and does not infringe upon any of the enumerated subject-matters assigned to the Dominion, then such provincial powers are plenary.

What objects or motives may have controlled or induced the passage of the legislation in question I do not know. Once I find its subject-matter is not within the powers of the Dominion Parliament and is within that of the provincial legislature, I

cannot inquire into its policy or justice or into the motives which prompted its passage.

But, in the present case, I have no reason to conclude that the legislation is not such as may be defended upon the highest grounds.

The regulations impeached in the *Union Colliery* case, [1899] A.C. 580, were, as stated by the Judicial Committee, in the later case of *Tomey Homma*, [1903] A.C. 151, at p. 157

not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

I think the pith and substance of the legislation now before us is entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the provincial legislatures in the case of *The Union Collieries v. Bryden*, [1899] A.C. 580.

The right to employ white women in any capacity or in any class of business is a civil right, and legislation upon that subject is clearly within the powers of the provincial legislatures. The right to guarantee and ensure their protection from a moral standpoint is, in my opinion, within such provincial powers and, if the legislation is *bonâ fide* for that purpose, it will be upheld even though it may operate prejudicially to one class or race of people.

There is no doubt in my mind that the prohibition is a racial one and that it does not cease to operate because a Chinaman becomes naturalized. It extends and was intended to extend to all Chinamen as such, naturalized or aliens. Questions which might arise in cases of mixed blood do not arise here.

The Chinaman prosecuted in this case was found to have been born in China and of Chinese parents and, although, at the date of the offence charged, he had become a naturalized British

subject, and had changed his political allegiance, he had not ceased to be a "Chinaman" within the meaning of that word as used in the statute. This would accord with the interpretation of the word "Chinaman" adopted by the judicial committee in the case of *The Union Colliery Company v. Bryden*, [1899] A.C. 580.

The prohibition against the employment of white women was not aimed at alien Chinamen simply or at Chinamen having any political affiliation. It was against "any Chinaman" whether owing allegiance to the rulers of the Chinese Empire, or the United States Republic, or the British Crown. In other words, it was not aimed at any class of Chinamen, or at the political status of Chinamen, but at Chinamen as men of a particular race or blood, and whether aliens or naturalized.

For these reasons I would dismiss the appeal with costs.

INDINGTON, J. (dissenting):—The legislature of Saskatchewan, by ch. 17 of the statutes of 1912, intituled An Act to prevent the Employment of Female Labour in certain capacities enacted as follows:—

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bond fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Japanese, Chinaman or other Oriental person;

which is followed by a penal clause under which appellant has been convicted. That conviction has been maintained by the Supreme Court of Saskatchewan in a judgment from which the learned Chief Justice of that Court dissented.

The first question raised is whether or not the appellant, who is admitted to have been born in China, of Chinese parents but was at the time of the alleged offence a naturalized British subject, falls within the Act. It is quite clear that the term "any Chinaman" may, in the plain, ordinary sense of the words, be so construed as to include naturalized British subjects. It is, to my mind, equally clear that, having regard to many considerations, to some of which I am about to advert, a proper and effective meaning may be given to this term without extending it to cover the naturalized British subject.

The Act, by its title, refers to female labour and then proceeds to deal with only the case of white women. In truth, its evident purpose is to curtail or restrict the rights of Chinamen. In view of the provisions of the Naturalization Act, under and pursuant to which the appellant, presumably, has become a naturalized British subject, one must have the gravest doubt if it ever was intended to apply such legislation to one so naturalized.

The Naturalization Act, in force long before and at the time of the creation of the Province of Saskatchewan, and ever since, provided by section 4 for aliens acquiring and holding real and personal property, and by sec. 24, as follows:—

24. An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject within Canada, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect.

These enactments rest upon the class No. 25 of the classification of subjects assigned, by sec. 91 of the British North America Act, 1867, to the exclusive jurisdiction of the Dominion Parliament, and which reads as follows: Naturalization and Aliens.

The political rights given any one, whether naturalized or natural-born British subjects, may in many respects be limited and varied by the legislation of a province, even if discriminating in favour of one section or class as against another. Some political rights or limitations thereof may be obviously beyond the power of such legislature. But the "other, rights, powers and privileges" (if meaning anything) of natural-born British subjects to be shared by naturalized British subjects, do not so clearly fall within the powers of the legislatures to discriminate with regard to as between classes or sections of the community.

It may well be argued that the highly prized gifts of equal freedom and equal opportunity before the law, are so characteristic of the tendency of all British modes of thinking and acting

in relation thereto, that they are not to be impaired by the whims of a legislature; and that equality taken away unless and until forfeited for causes which civilized men recognize as valid. For example, is it competent for a legislature to create a system of slavery and, above all, such a system as applied to naturalized British subjects? This legislation is but a piece of the product of the mode of thought that begot and maintained slavery; not so long ago fiercely claimed to be a laudable system of governing those incapable of governing themselves.

Again, it may also be well argued that, within the exclusive powers given to the Dominion Parliament over the subject of naturalization and aliens, there is implied the power to guarantee to all naturalized subjects that equality of freedom and opportunity to which I have adverted. And I ask, has it not done so by the foregoing provision of the Naturalization Act?

It is quite clear that, if the Dominion Government so desire, it can, by the use of the veto power given it over all local provincial legislation insist upon the preservation of this equality of freedom and opportunity.

It is equally clear that a casual consideration of this Saskatchewan Act might not arrest the attention of those whose duty it is to consider and determine whether or not any provincial Act should be vetoed. It might well be that, in regard to such an Act respecting aliens, those discharging the duty relative to the veto power might let it go for what it might be worth, knowing that, as to them, Parliament could later intervene; whereas other considerations might arise as to naturalized subjects and the duty to protect those naturalized be overlooked by reason of the general term used.

It may be that the guarantee which I incline to think is implied in the Naturalization Act covers the ground. If so, there is then in this Act that which, as applied to the appellant (a naturalized subject) is *ultra vires* the legislature.

If so, this conviction falls to the ground. Much stress is laid, on the one hand, upon the expression of opinion in the judgment of the Judicial Committee of the Privy Council in the case of *The Union Colliery Co. v. Bryden*, [1899] A.C. 580, and,

on the other hand, in that in the judgment of the same Court in the case of *Cunningham v. Tomey Homma*, [1903] A.C. 151.

I may observe that a decision is only binding for that which is necessary to the decision of the case and add that, perhaps, neither expression of opinion now relied upon by the respective parties hereto was actually necessary for the determination of the case. Perhaps neither decision, in itself, can be said to be conclusive by way of governing the questions to be resolved herein. But of the two the former, certainly, so far as one can gather from the report, touches more nearly or directly the point involved in the present inquiry.

Of course, such opinions, even if *obiter dicta*, are entitled to that weight to be given such eminent authority. What was clearly decided in the first case was that such comprehensive language as used in the regulation in question and, I rather think, aimed chiefly at alien Chinamen, was *ultra vires*, and, in the other, that the political right to vote was something within the express power of the legislature to give or withhold or restrict as it should see fit. This later point in no way touches what is raised herein.

With the very greatest respect, I submit that the *obiter dictum*, relative to the limitations of the power existent in the Dominion Parliament by virtue of the assignment to it of paramount legislative authority over the subject of "naturalization and aliens" never was intended to be treated or taken in the sense now sought to be attributed to it, and, if bearing such implication, that it is not maintainable.

Canada, for example, is deeply interested as a whole and always has been in the colonization of its waste lands by aliens expecting to become British subjects, and surely the power over naturalization must involve in its exercise many considerations relative to the future status of such people as invited to go there and accept the guarantees and inducements offered them. To define and forever determine beyond the power of any legislature to alter the status of such people and measure out their rights by that enjoyed by the native-born seems to me a power implied in the power over "naturalization and aliens." Many incidental powers have, as something implied in the other

powers, contained in the same category, been held as attached thereto or to be used as part thereof with less excuse for the implication of incidental power there in question than would be involved in going a good deal further than I suggest in the execution of this power over "naturalization and aliens" the Dominion Parliament may go.

Some of these guarantees might depend on conventions with other powers, and I should hesitate to hamper the exercise of the power by any such limitations thereon as a provincial legislature might think fit to impose. That power must be treated as the other powers categorically assigned to Parliament by section 91 of the B.N.A. Act, 1867, in a wide and statesman-like fashion. All these considerations have, in a measure, been observed in the provisions of the Naturalization Act, and in framing the provisions I have quoted and other like provisions. No one can, as of right, become naturalized. He must reside for three years in this country and thus become known to those who have to aid in his qualifying himself by shewing that he is of good character. Unless and until he fulfil these conditions he cannot come within the class to which appellant belongs.

The appellant having, under the Naturalization Act (as I think fair to infer) become a British subject, he has presumably been certified to as a man of good character and enjoying the assurance, conveyed in section thereof which I have quoted, of equal treatment with other British subjects, I shall not willingly impute an intention to the legislature to violate that assurance by this legislation specially aimed at his fellow-countrymen in origin. Indeed, in a piece of legislation alleged to have been promoted in the interests of morality, it would seem a strange thing to find it founded upon a breach of good faith which lies at the root of nearly all morality worth bothering one's head about.

Having regard to all the foregoing considerations and the further consideration that this is a penal statute and, therefore, to be read and construed according to the principle applicable to such like statutes, I think this is one of the relatively few instances in which we can depart from the cardinal rule of interpreting all documents, including statutes, according to the plain

ordinary reading of the language used, and, with Bowen, L.J., in *Wandsworth Board of Works v. United Telephone Co.*, 13 Q.B.D. 904, ask ourselves if these words so read are capable of two constructions and, if so, say:—

It is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act, and not to give any unnecessary powers.

Or say, with Keating, J., in *Boon v. Howard* (in 1874), L.R. 9 C.P. 277, at 308:—

If the words are susceptible of a reasonable and also of an unreasonable construction, the former construction must prevail.

Other like cases are collected in *Hardcastle* (3 ed.), at 174 *et seq.*

Looked at from this point of view I am constrained to think that this Act must be construed as applicable only to those Chinamen who have not become naturalized British subjects, and is not applicable to the appellant who has become such.

Whether it is *ultra vires* or *intra vires* the alien Chinamen is a question with which, in this view, I have nothing to do.

Yet, in deference to the argument put forward in way of so interpreting the British North America Act that the reservation to Parliament at the end of sec. 91 of the powers enumerated in said section 91 must apply only in its limitation to item number 16 of sec. 92, instead of as usually construed, so far as necessary to each and all of the enumerated powers given by that section, I may be permitted to say that I wholly dissent from the view put forward. I look upon the powers given Parliament in the twenty-nine enumerated classes set forth in sec. 91, so far as necessary to give efficacy thereto, as paramount to anything contained elsewhere as in sec. 92.

Subject thereto, and some other special powers given Parliament, the powers given the legislatures are exclusive and cannot be infringed upon or restricted save by the veto power. There is, however, the possibility of legislation by a legislature being held good until Parliament asserts its powers in conflict therewith.

Until this relation of the powers respectively given Parliament and the legislatures and their order of priority and superi-

ority is thoroughly comprehended and acted upon, there is sure to be confusion in working the system and that confusion invites and induces still greater confusion when the place of the residual power has to be fixed and the relation thereof to these considered.

The maintenance of the warehouse receipts given banks by virtue of the Bank Act, as against local legislation resting upon authority over property and civil rights, as held in *Tennant v. The Union Bank of Canada*, [1894] A.C. 31, illustrates how unfounded is the argument put forward. And the case of the *Grand Trunk Railway Company v. The Attorney-General of Canada*, [1907] A.C. 65, relative to the power of a railway company to contract itself out of the provision of the Railway Act, prohibiting such a contract with its employees, is another illustration of how the law of a province, quite good till Parliament asserted its power, by virtue of sec. 91, sub-sec. 29, must bend before such assertion of superior power.

The fact that Parliament has, in regard to naturalization, intervened, has much weight with me in reaching the conclusion I have as a reason why the legislature must not be presumed to have decided to ignore what is enacted by Parliament.

I am by no means to be held as deciding the effect of that legislation by Parliament. All I say, in way of deciding herein, is that until, in such case, the legislature makes it clear that it intended to question the effect of that legislation, I need go no further than say it has not clearly expressed its intention to assert and exercise such a doubtful right.

It is an attempt to cover and classify by an ambiguous term the case of a man who is in truth and fact what the term used clearly implies, and may return home any day, with that of a man who may have bid good-bye forever to his native land, induced to do so by the assurances offered him. I may add that we are not instructed as to the exact relation between China and Great Britain in regard to the position of the appellant, and, for the present purpose, that is immaterial, but I can conceive of further considerations of this sort of legislation rendering more full information necessary than this case does. And, if the like term "Chinaman," as used here and in *The Union*

Colliery Co. v. Bryden, [1899] A.C. 580, is to be read as extending to such, when naturalized British subjects, then the decision therein must bind us herein.

I think, therefore, that this appeal should be allowed with costs.

DUFF, J.:—The first question to be considered is a question of jurisdiction which was raised during the course of the argument. The appeal comes before us by leave, under sec. 37(c), but an order made under that provision does not conclude the question of jurisdiction which arises here. Sec. 36, sub-sec. "b," provides in express terms that there shall be "no appeal in a criminal case except as provided in the Criminal Code." In the judgments of three members of the Court in *Re McNutt*, 47 Can. S.C.R. 259, 10 D.L.R. 834, 21 Can. Cr. Cas. 157, 49 C.L.J. 117, the word "criminal," as it appears in sec. 39, sub-sec. "c" (and it is obviously used in the same sense in sub-sec. "a," sec. 36) was construed in the broad sense as applying to proceedings for the punishment of offences under provincial penal enactments, which, if passed by a legislature exercising authority unrestricted as to subject-matter would, according to the general principles, be classified as criminal law. See pages 261, 267 and 286.

If these views correctly interpret the word "criminal" in sec. 39(c), it would follow, I think, that the appeal in the present case comes within the prohibitions of sec. 36(b), and is incompetent.

For reasons, however, which I gave in full *In re McNutt*, 47 Can. S.C.R. 259, 10 D.L.R. 834, 21 Can. Cr. Cas. 157, 49 C.L.J. 117, I think the phrases "criminal case" and "criminal charge" in these provisions of the Supreme Court Act must be read in the narrow sense there indicated, and in my view the prohibitions contained in sub-sec. "a" and "b," of sec. 36, have no application to judgments in proceedings under provincial penal statutes.

The statute in question came into force on May 1, 1912, and is in the following words:—

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or,

save as a bona fide customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Japanese, Chinaman or other Oriental person.

2. Any employer guilty of any contravention or violation of this Act shall, upon summary conviction, be liable to a penalty not exceeding \$100 and, in default of payment, to imprisonment for a term not exceeding two months.

3. This Act shall come into force on the first of May, 1912.

On May 27, 1912, the appellant, who was a restaurant keeper, was convicted by the police magistrate of Moose Jaw of the offence of employing white female servants in contravention of the provisions of this Act. On January 11, 1913, the Act was amended by striking out the italicized words in the last two lines of sec. 1, its application being thereby limited to "Chinamen."

The appellant, at the time of the alleged offence, had been naturalized under the naturalization laws of Canada.

The first question for consideration, which is the substantial question on the appeal, is whether, assuming that this statute is not in conflict with any Act passed by the Parliament of Canada, it is within the scope of the legislative powers of the Province of Saskatchewan.

It might plausibly be contended that it is legislation in relation to any one of these three classes of subjects: "local undertakings," sec. 92 (B.N.A. Act), item 10, or "property and civil rights" within Saskatchewan, sec. 92(13), or "matters merely local or private" in Saskatchewan, sec. 92(16). For the purposes of this judgment it may be assumed that the words "any restaurant, laundry or other place of business or amusement" are not in this enactment descriptive of "local works or undertakings" within the meaning of sec. 92(10); and I shall assume further that (although the legislation does unquestionably deal with civil rights) the real purpose of it is to abate or prevent a "local evil" and that considerations similar to those which influenced the minds of the Judicial Committee in *The Attorney-General of Manitoba v. The Manitoba License-Holders' Association*, [1902] A.C. 73, lead to the conclusion that the Act ought to be regarded as enacted under sec. 92(16), "matters merely local or private within the province," rather than under sec. 92 (13), "property and civil rights within the province." There

can be no doubt that, *primâ facie*, legislation prohibiting the employment of specified classes of persons in particular occupations on grounds which touch the public health, the public morality or the public order from the "local and provincial point of view" may fall within the domain of the authority conferred upon the provinces by sec. 92(16).

Such legislation stands upon precisely the same footing in relation to the respective powers of the provinces and of the Dominion as the legislation providing for the local prohibition of the sale of liquor, the validity of which legislation has been sustained by several well-known decisions of the Judicial Committee, including that already referred to.

The enactment is not necessarily brought within the category of "criminal law," as that phrase is used in sec. 91 of the B.N.A. Act, 1867, by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions. The decisions in *Hodge v. The Queen*, 9 App. Cas. 117, and in the *Attorney-General for Ontario v. The Attorney-General for the Dominion*, [1896] A.C. 348, as well as in the *Attorney-General of Manitoba v. The Manitoba Licence-Holders' Association*, [1902] A.C. 73, already mentioned, established that the provinces may, under sec. 92(16) of the B.N.A. Act, 1867, suppress a provincial evil by prohibiting *simpliciter* the doing of the acts which constitute the evil or the maintaining of conditions affording a favourable *milieu* for it, under the sanction of penalties authorized by sec. 92(15).

The authority of the legislature of Saskatchewan to enact this statute now before us is disputed upon the ground that the Act is really and truly legislation in relation to a matter which falls within the subject assigned exclusively to the Dominion by sec. 91(25), "aliens and naturalization," and to which, therefore, the jurisdiction of the province does not extend. This is said to be shewn by the decision of the Privy Council in *The Union Colliery Co. v. Bryden*, [1899] A.C. 580.

I think that, on the proper construction of this Act (and this appears to me to be the decisive point), it applies to persons of the races mentioned without regard to nationality. According to the common understanding of the words "Japanese, China-

man or other Oriental person," they would embrace persons otherwise answering the description who, as being born in British territory (Singapore, Hong Kong, Victoria or Vancouver, for instance), are natural born subjects of His Majesty equally with persons of other nationalities. The terms Chinaman and Chinese, as generally used in Canadian legislation, point to a classification based upon origin, upon racial or personal characteristics and habits, rather than upon nationality or allegiance. The Chinese Immigration Act, for example, R.S.C., 1906, ch. 95 (sec. 2 (d) and sec. 7), particularly illustrates this; and the judgment of Mr. Justice Martin, *In re The Coal Mines Regulation Act*, 10 B.C.R. 408, at pp. 421 and 428, gives other illustrations. Indeed, the presence of the phrase "other Oriental persons" seems to make it clear, even if there could otherwise have been any doubt upon the point, that the legislature is not dealing with these classes of persons according to nationality, but as persons of a certain origin or persons having certain common characteristics and habits sufficiently indicated by the language used.

Primâ facie, therefore, the Act is not an Act dealing with aliens or with naturalized subjects as such. It seems also impossible to say that the Act is, in its practical operation, limited to aliens and naturalized subjects. From the figures given by the census of 1911 it appears that, while the total Chinese population of the three western provinces was about 22,000, there were about 1,700 persons born in Canada classed as Chinese, nearly all of whom would be found in those provinces; and these, of course, are natural born subjects of His Majesty. There are at this moment in Wesern Canada, moreover, considerable numbers of people unquestionably embraced within the description "Oriental persons" who have come to this country from other parts of His Majesty's territorial dominions and as regards nationality stand in the same category. The Act would (giving its words their usual meaning) apply to all these; and there can be no sound reason for suggesting that they can, consistently with the objects of the enactment, be excluded from the field of its operation.

The appellant's attack is really based upon a certain interpretation of the decision of their Lordships by the Judicial

Committee in *The Union Colliery Co. v. Bryden*, [1899] A.C. 580. Lord Watson, in delivering their Lordships' judgment, at p. 587, said:—

But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the province of British Columbia. . . .

They are also of opinion that the whole pith and substance of the enactments or section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and, therefore, trench upon the exclusive authority of the Parliament of Canada.

Of the legislation before us it would be impossible to say that “it has and can have no application except to ‘Orientals’ who are aliens or naturalized subjects,” as I have already pointed out. It seems equally impossible to affirm that it establishes any rule or regulation at all comparable to regulations of the character described by His Lordship, viz., “that these aliens or naturalized subjects shall not work or be allowed to work in certain industries,” and, lastly, it would be going quite beyond what is warranted by anything like a fair reading of the statute before us to say of it that “it establishes no rule or regulation laying a prohibition upon aliens or naturalized subjects.”

Orientals are not prohibited in terms from carrying on any establishment of the kind mentioned. Nor is there any ground for supposing that the effect of the prohibition created by the statute will be to prevent such persons carrying on any such business. It would require some evidence of it to convince me that the right and opportunity to employ white women is, in any business sense, a necessary condition for the effective carrying on by Orientals of restaurants and laundries and like establishments in the Western provinces of Canada. Neither is there any ground for supposing that this legislation is designed to deprive Orientals of the opportunity of gaining a livelihood.

There is nothing in the Act itself to indicate that the legislature is doing anything more than attempting to deal according to its lights (as it is its duty to do) with a strictly local situation. In the sparsely inhabited Western provinces of this

country the presence of Orientals in comparatively considerable numbers not infrequently raises questions for public discussion and treatment, and, sometimes in an acute degree, which in more thickly populated countries would excite little or no general interest. One can without difficulty figure to one's self the considerations which may have influenced the Saskatchewan Legislature in dealing with the practice of white girls taking employment in such circumstances as are within the contemplation of this Act; considerations, for example, touching the interests of immigrant European women, and considerations touching the effect of such a practice upon the local relations between Europeans and Orientals; to say nothing of considerations affecting the administration of the law. And, in view of all this, I think, with great respect, it is quite impossible to apply with justice to this enactment the observation of Lord Watson in the *Bryden* case, [1899] A.C. 580, that "the whole pith and substance of it is that it establishes a prohibition affecting" Orientals. For these reasons, I think, apart altogether from the decision in *Cunningham v. Tomey Homma*, [1903] A.C. 151, to which I am about to refer, that the question of the legality of this statute is not ruled by the decision in *Bryden's* case.

I think, however, that in applying *Bryden's* case we are not entitled to pass over the authoritative interpretation of that decision which was pronounced some years later by the Judicial Committee itself in *Cunningham v. Tomey Homma*, [1903] A.C. 151. The legislation their Lordships had to examine in the last mentioned case, it is true, related to a different subject-matter. Their Lordships, however, put their decision upon grounds that appear to be strictly appropriate to the question raised on this appeal. Starting from the point that the enactment then in controversy was *prima facie* within the scope of the powers conferred by sec. 92(1), they proceeded to examine the question whether, according to the true construction of sec. 91 (25), the subject-matter of it really fell within the subject of "aliens and naturalization"; and, in order to pass upon that point, their Lordships considered and expounded the meaning of that article.

At pp. 156 and 157, Lord Halsbury, delivering their Lordships' judgment, says:—

If the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of section 91, sub-section 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

It was hardly disputed that if this passage stood alone the argument of the appellant must fail. But it is said that this passage is *obiter* and is inconsistent with and, indeed, contradictory to certain passages in Lord Watson's judgment in *Bryden's case*, [1899] A.C. 580, which passages, it is contended, give the true ground of the decision in that case and, consequently, are binding upon us. I have already said what I have to say as to the effect of Lord Watson's judgment; but I think this last mentioned argument is completely answered by reference to a subsequent passage of Lord Halsbury's judgment in *Cunningham's case*, [1903] at p. 157. It is as follows:—

That case depended upon totally different grounds. This Board dealing with the particular facts of the case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

That is an interpretation of *Bryden's case*, [1899] A.C. 580, which it appears to me to be our duty to accept.

It should not be forgotten that the very eminent Judges (Lord Halsbury, Lord Macnaghten, Lord Lindley), constituting the Board which heard the appeal in *Cunningham's case*, [1903] A.C. 151, had that case before them for something like six months after it had been very fully argued by Mr. Blake against the provincial view; and, in delivering the considered judgment of the Board, Lord Halsbury, as we have seen, examines and sums up the effect of the decision in *Bryden's case*,

[1899] A.C. 580, which the Courts in British Columbia had believed themselves to be following in passing upon *Cunningham's* case, [1903] A.C. 151. In these circumstances, whatever might otherwise have been one's view of their Lordships' judgment in *Bryden's* case, [1899] A.C. 580, we should not be entitled to adopt and act upon a view as to the construction of item 25 of sec. 91 (B.N.A. Act), which was distinctly and categorically rejected in the later judgment.

There is one more point to be noted. Section 24 of the Naturalization Act, ch. 77, of the R.S.C., 1906, provides as follows:

24. An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject within Canada, with this qualification that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect.

It is unnecessary to consider whether or not this section goes beyond the powers of the Dominion in respect of the subject of naturalization, or whether "the rights, powers and privileges" referred to therein ought to be construed as meaning those only which are implied by the "protection" that is referred to as the correlative of allegiance in the passage above quoted from the judgment of the Judicial Committee in *Cunningham's* case, [1903] A.C. 151. This much seems clear: The section cannot fairly be construed as conferring upon persons naturalized under the provisions of the Naturalization Act, a status in which they are exempt from the operation of laws passed by a provincial legislature in relation to the subjects of sec. 92 of the British North America Act, 1867, and applying to native-born subjects of His Majesty in like manner as to naturalized subjects and aliens. If the enactment in question had been confined to Orientals who are native-born British subjects it would have been impossible to argue that there was any sort of invasion of the Dominion jurisdiction under sec. 91 (25); and it seems equally impossible to say that this legislation deprives any Oriental, who is a naturalized subject, of any of "the rights, powers and privi-

leges" which an Oriental, who is a native-born British subject, is allowed to exercise or retain.

ANGLIN, J., agreed with Davies, J.

Appeal dismissed with costs.

N.B.—Leave to appeal was refused by the Judicial Committee of the Privy Council, May 19, 1914.

[TERRITORIAL COURT OF THE YUKON TERRITORY.]

BEFORE BLACK, J., PRO TEMP.

REX v. JEANNETTE JOHNSON.

1. DISORDERLY HOUSE (§ I—15)—OFFENCE OF KEEPING.

A charge of keeping a bawdy house is cumulative, and evidence of particular acts and the particular time of doing them is admissible, although the charge is in general terms only.

[*R. v. St. Clair*, 3 Can. Cr. Cas. 551; *R. v. Mercier*, 13 Can. Cr. 475, referred to.]

DECIDED: May 27, 1914.

APPEAL to the Judge of the Territorial Court of the Yukon Territory from a summary conviction made by Major J. D. Moodie, justice of the peace, and being a commissioned officer of the Royal North-West Mounted Police, having, possessing and exercising the powers of two justices of the peace within the Yukon Territory, on the 11th day of May, 1914, at Dawson, in the said Territory; whereby the said Jeannette Johnson was convicted of being the keeper of a bawdy house or house of ill fame at Dawson aforesaid, and being thereby a loose, idle or disorderly person or vagrant; contrary to section 238, sub-section "j," and section 239 of the Criminal Code of Canada.

F. T. Congdon, K.C., for appellant.

J. P. Smith, Crown prosecutor, for the Crown.

BLACK, J. :—The appellant Jeannette Johnson, a negress, was convicted before Major Moodie, as stated above, of keeping a bawdy house or house of ill fame in the city of Dawson, and was sentenced to be imprisoned in the common gaol at Dawson in the Yukon Territory for the term of two months with hard labour.

An appeal was taken from this conviction and pending the hearing of the appeal the appellant, having given security as required by law, was released on bail, the hearing of the appeal being had before me on Friday, the 22nd day of May, 1914.

No technical objections were raised on behalf of the appellant and the matter was proceeded with as a trial *de novo*.

The same witnesses, with the addition of one called on behalf of the appellant, as were heard in the Court below gave evidence before me.

In Roscoe's Criminal Evidence, 11th ed., 86, it is laid down in reference to the offence charged (that of keeping a bawdy house or house of ill fame) that "it is a cumulative offence. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do, but if unknown persons are proved to have been there, conducting themselves in a disorderly manner, it will maintain the indictment."

Evidence of the general reputation of the house, while perhaps not alone sufficient to convict, is held to be admissible, and in the case of *The Queen v. St. Clair*, 3 Can. Cr. Cas. 551, cited by the Crown prosecutor, Osler, J.A., who delivered the judgment of the Ontario Court of Appeal, said:—

Such reputation is not acquired without acts or conduct capable of proof from which the character of the house may be inferred, such as the character of the women as being common prostitutes, and the facts of men visiting the house at all hours, and dissolute and disorderly behaviour there.

The charge may be general, yet at the trial evidence of particular acts and the particular time of doing them may be given.

In the case of *The King v. Mercier*, 13 Can. Cr. Cas. 475, tried before Mr. Justice Craig at Dawson in 1908, also cited by the Crown, it was held that under section 225 of the Criminal Code a room in a hotel habitually resorted to by only one prostitute and her paramours for purposes of prostitution is a "common bawdy house," and the hotelkeeper who, with knowledge of

the facts, permits the continuance of such use of the room is properly convicted as a keeper; and it is there held that sec. 225 of the Code means that a house occupied by even one person who receives men and prostitutes herself, is a bawdy house, and that one person resorting to a house for that purpose, to the knowledge of the owner of the house, constitutes an offence also.

In the case before me we have the evidence of the woman Vera Hall, a white woman, who frankly admits that she is and has been a prostitute; that she knew the appellant Jeannette Johnson at Nome, Alaska, in 1912-13, where, according to the evidence of the said Vera Hall, both women were living in a restricted district in houses about ten yards apart, and both following the life of prostitution. Then we have them both coming to Dawson during the past winter, the appellant Johnson advertising herself as a caterer and engaging to some extent in that business; evidently, as it would now appear, to cover up her real character; while Vera Hall, who makes no pretense of being other than a prostitute, immediately after her arrival in Dawson, seeks out the appellant and remains with her in the house for immoral purposes, and undoubtedly, from the evidence, with the knowledge and connivance of the appellant, who also received men there both day and night; one, a white man, being a frequent visitor, and referred to in the evidence as her sweetheart.

After remaining for a week in the Johnson woman's house the evidence shews that the said Vera Hall removed to Klondike City, a resort of prostitutes, and while living at the last-named place paid occasional visits at the house of the appellant, in Dawson, and we find the appellant in company with Vera Hall and another prostitute and a man going out at six in the morning on what she is pleased to call a "joy ride," and on this occasion visiting Vera Hall at her house in Klondike City.

We have the evidence of Sergeant Mapley, of the Royal North-West Mounted Police, that the reputation of the said house was that of a house of ill fame. The evidence of Harry McGuinness and Charles James Cameron, both men of good character and reputation living in houses in close proximity to the house complained of, is that the said house was, at and during the time mentioned, a resort

of men at all hours; that the women living there, the appellant and Vera Hall, were seen drunk and indecently clad about the premises; that music and dancing would continue sometimes during the whole night, and that the place had become a nuisance in the neighbourhood.

The gist of the offence of keeping a bawdy house is that it is an offence to the public and dangerous to the morals of the community, and all of these things have been amply proven by the evidence in this case, to which, however, I shall not here make further reference.

Dawson is a comparatively small community, and conduct such as these women have been guilty of is very noticeable and soon becomes a public scandal. The public have a right to be protected from this sort of thing. We have, too, in Dawson, a number of women, some of them colored women, industrious and respectable citizens, who are making an honest and respectable living by catering and doing general service in private houses and elsewhere, and these women should not be prejudiced by women of the character of this appellant being permitted with brazen effrontery to flaunt themselves in the face of the law and of the community as this Johnson woman has done; and in the case of the appellant I may say further that she has added to the offence that of wilful perjury in almost every important point of her evidence given on the hearing of the appeal.

The order will be that the appeal will be dismissed with costs to be paid forthwith by the appellant, and the appellant Jeannette Johnson will complete the term of the sentence or punishment adjudged by the conviction in the Court below.

Conviction affirmed.

[SUPREME COURT OF ONTARIO.]

APPELLATE DIVISION.

BEFORE SIR WILLIAM RALPH MEREDITH, C.J.O., MACLAREN, AND
MAGEE, JJ.A., AND LENNOX AND LEITCH, JJ.

REX v. FRASER.

1. APPEAL (§ I C—25)—CRIMINAL CASES—INDICTMENT—STATUS OF PRIVATE PROSECUTOR.

The right of the "prosecutor" to appeal on a question of law by case reserved under Cr. Code 1014(3) or by leave under Cr. Code 1015 on an acquittal of the accused, is limited to the Crown when the proceedings on the indictment are conducted by the Crown counsel; and where the Crown counsel was refused a reserved case at the trial, whereupon the informant, who had been bound over to prefer the indictment and had done so, also applied and was refused, the latter has no *locus standi* to make a subsequent application under Code sec. 1015 for leave to appeal where the Crown makes no application.

[*R. v. Gilmore*, 7 Can. Cr. Cas. 219, 6 O.L.R. 286, and *R. v. Patteson*, 36 U.C.Q.B. 129, referred to.]

2. CRIMINAL LAW (§ II A—33)—RECOGNIZANCE TO PREFER INDICTMENT—PROSECUTION ASSUMED BY CROWN—PRIVATE PROSECUTOR.

Where a private prosecutor institutes the proceedings on a criminal charge and has himself bound over to prefer an indictment at the Court of General Sessions, the Crown Attorney for the county has the statutory right in Ontario under the Crown Attorney's Act, R.S.O. 1914, ch. 91, sec. 8, to "assume wholly the conduct of the case where justice towards the accused seems to demand his interposition," and upon his taking charge of the prosecution after a true bill has been found, the private prosecutor has no right to take part in the proceedings at the trial, at least where the case does not present more of the features of a private injury than of a public offence. (Crown Attorney's Act, R.S.O. 1914, ch. 91, sec. 8(c).)

ARGUED: January 31, 1914.

DECIDED: February 23, 1914.

APPLICATION by John Scully, the informant, under sec. 1015 of the Criminal Code, R.S.C. 1906, ch. 146, for leave to appeal to a Divisional Court of the Appellate Division from the ruling of MORGAN, Jun. Co. C.J., at the York General Sessions, and for an order directing him to state a case for the opinion of the Court, which he had refused to do. The Judge ruled that the Crown had not made out a case, and the jury, under his direction, found the defendants "not guilty" of the offence charged, being an offence against sec. 236 of the Code, dealing with lotteries.

Gordon Waldron, for the applicant.

C. H. Ritchie, K.C., for the defendants, the respondents, objected that the applicant had no status.

The preliminary question thus raised was argued, and judgment was reserved thereon.

February 23. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an application by John Scully, under sec. 1015 of the Criminal Code (R.S.C. 1906, ch. 146), for leave to appeal to a Divisional Court.

An information was laid by the applicant before the Police Magistrate for the City of Toronto against the respondents, charging them with a contravention of sec. 236 of the Criminal Code, and the respondents were committed for trial, and the applicant was bound over to prosecute.

An indictment was preferred at the General Sessions of the Peace for the County of York against the respondents for the offence charged in the information, and it was preferred by the Crown Attorney. A true bill having been found, the trial proceeded before His Honour Judge Morgan, presiding at the General Sessions on the 7th October, 1913, and the Crown Attorney conducted the prosecution at the trial.

At the close of the case for the prosecution, the presiding Judge ruled that no case had been made, and directed the jury to acquit, whereupon a verdict of "not guilty" was rendered.

After this ruling the Crown Attorney applied for a reserved case, which was refused, whereupon Mr. Waldron intervened on behalf of the present applicant and submitted that the reserved case should be granted, but without success.

Upon the opening of the motion, a question was raised as to the right of the applicant to apply; and, after argument, judgment was reserved upon this preliminary question.

No case was cited by either counsel bearing upon the question to be determined, and the only case which bears upon it that I have been able to find is *Rex v. Gilmore* (1903), 7 Can. Cr. Cas. 219, 6 O.L.R. 286, in which it was decided by the present Chief Justice of the Common Pleas that a private prosecutor was "no party to" a "prosecution" in the County Court Judge's Crim-

inal Court for perjury, "nor indeed bound by any judgment that may be made in it," and that, though "he may, with the consent of the proper authorities, proceed in the name of the Sovereign," he has "against the will of both parties" (i.e., the Crown and the accused) "no power over, or voice in, the prosecution."

Sub-section 3 of sec. 1014 of the Criminal Code provides that: "Either the prosecutor or the accused may during the trial, either orally or in writing, apply to the Court to reserve any such question as aforesaid" (i.e., "any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge") "and the Court, if it refuses so to reserve it, shall nevertheless take a note of such objection."

By sub-sec. 1 of sec. 1015 it is provided: "If the Court refuses to reserve the question, the party applying may move the Court of Appeal as hereinafter provided."

And sub-sec. 2 provides that: "The Attorney-General or party so applying may, on notice of motion to be given to the accused or prosecutor, as the case may be, move the Court of Appeal for leave to appeal."

It is clear that the applicant, having been bound over to prosecute, was entitled to prefer a bill of indictment for the charge on which the respondents had been committed or in respect of which he was so bound over, or for any charge founded on the facts or evidence disclosed in the depositions taken before the Police Magistrate: sec. 871.

By the Crown Attorneys Act (Ontario), 9 Edw. VII. ch. 55, sec. 8, clause (b), it is made the duty of the Crown Attorney to "institute and conduct on the part of the Crown prosecutions for crimes and misdemeanours at the Court of General Sessions of the Peace . . . in the same manner as the law officers of the Crown institute and conduct similar prosecutions at the sittings of the High Court, and with like rights and privileges, except as to the right of entering a *nolle prosequi*."

That, at all events after a true bill has been found, unless the case is one to which clause (c), to which I shall afterwards refer, applies, the person by whom the information was laid, or

who, where he may do so, has preferred the bill of indictment, has no right to take part in the proceedings at the trial, seems reasonably clear; for, if it were not so, the duty imposed upon the Crown Attorney of conducting on the part of the Crown the prosecution could not be discharged.

This is made more clear by the provisions of clause (c), which requires the Crown Attorney to "watch over the conduct at the Court of General Sessions of the Peace of cases wherein it is questionable whether the conduct complained of is punishable by law or where the particular act or omission presents more of the features of a private injury than of a public offence; and, without unnecessarily interfering with private individuals who wish in such cases to prosecute, assume wholly the conduct of the case where justice towards the accused seems to demand his interposition."

The prosecution of the respondents does not come within the exception mentioned in clause (c); and, therefore, the conduct of it on the part of the Crown devolved upon the Crown Attorney, by whom it was in fact conducted for the Crown.

If the contention of counsel for the applicant were well-founded, it would have been the right of the applicant or his counsel, as was contended in *Rex v. Gilmore*, to intervene at any stage of the proceedings at the trial; and that cannot be, because the exercise of the right to do so would render it impossible for the Crown Attorney to discharge the duty imposed upon him by the statute of conducting the prosecution for the Crown; and, if the applicant's counsel is right in his contention, what would happen if counsel representing the Crown acquiesced in the ruling of the Court and consented to the acquittal of the accused, and counsel for the private prosecutor took the opposite view?

The application of Mr. Waldron at the Sessions was made before the jury were directed to render a verdict of "not guilty;" and, in my opinion, the applicant had no *locus standi* to make the application, which was a part of the proceedings in the prosecution, the conduct of which was committed to the Crown Attorney.

The practice of allowing an appeal where the accused has

been acquitted is a novel one, and the right to appeal should, in my opinion, be strictly limited to cases coming plainly within the provisions of the statute. It cannot, I think, have been intended that where the Crown, representing the people of the Province, does not deem the case one in which the right of appeal should be invoked, the person by whom the charge was originally laid should have the right to invoke it. What was intended by the legislation in question was, I think, to confer that right upon the Crown where there has been an acquittal, at all events where the prosecution has been conducted on the part of the Crown by its law officers or by the Crown Attorney, and upon the accused where he has been convicted.

The Crown, and not the person by whom the proceedings were instituted, is, I think, the prosecutor in all cases of prosecutions for indictable offences, at all events after a bill has been found, unless the case comes within clause (c). The person who institutes the proceedings is called in sec. 1045 of the Code, which deals with the costs of a prosecution for the publication of a defamatory libel, where judgment is given for the defendant, "the private prosecutor," not "the prosecutor."

None of the sections referred to by Mr. Waldron as shewing that the word "prosecutor," as used in secs. 1014 and 1015, has a wider meaning than I would give to it, applies to proceedings upon an indictment, except sec. 871, to which I have already referred, and secs. 872 and 944. They all relate to proceedings before a bill is found, and it may well be that as to such proceedings the complainant is the prosecutor.

If by "prosecutor," as used in sub-sec. 3 of sec. 1014, the person who instituted the proceedings is meant, there would be no right in the Crown to apply, because, *ex hypothesi*, the Crown is not the prosecutor.

Section 872 does not affect the question, as it deals only with the preferring of a bill of indictment by the counsel acting on behalf of the Crown, nor does sec. 944 help the applicant. The expression there used is "counsel for the prosecution," and it is not open to question that in this case the counsel for the prosecution was the Crown Attorney. If it were otherwise, and the person who laid the complaint were the prosecutor, his

counsel, not the counsel for the Crown, would have the right of addressing the jury, as the section provides, even in such a case as this, in which the prosecution was required by law to be and was conducted by the Crown Attorney; which is *reductio ad absurdum*.

It was argued that, if it had been intended that only the Crown should have the right to apply, different language would have been used; but there are, I think, two answers to the argument: (1) there are, as has been seen, cases in which in this Province the private prosecutor may prosecute at the trial; and (2) the Act applies to the whole of Canada, and, no doubt, in some of the Provinces, as is the case in England, a private prosecutor may prosecute at the trial for an indictable offence, and the wide term "prosecutor" was used so as to meet whatever might be the conditions in this respect in any part of Canada.

In short, I am of opinion that, as applied to this Province, the expression "prosecutor" means the Crown where the prosecution is conducted at the trial by the law officers of the Crown or by the Crown Attorney, and means private prosecutor where the prosecution is conducted by or on his behalf.

For these reasons, I am of opinion that the preliminary objection was well taken, and that the motion must be dismissed; and, as the point is a new one, it is proper, I think, that the dismissal should be without costs.

Since the foregoing was written, my attention has been called to *Regina v. Patteson* (1875), 36 U.C.R. 129, in which will be found an interesting discussion as to the conduct of criminal prosecutions and the position of the private prosecutor on the trial of an indictment for the publication of a defamatory libel.

Motion dismissed.

[SUPREME COURT OF ONTARIO.]

APPELLATE DIVISION.

BEFORE SIR WILLIAM RALPH MEREDITH, C.J.O., MACLAREN,
MAGEE AND HODGINS, J.J.A., AND LENNOX, J.

REX v. HELLIWELL.

1. GAMING (§ I—4)—POOL SELLING—BETTING—JURISDICTION OF POLICE
MAGISTRATE.

A person charged before a Police Magistrate with a contravention of sec. 235 of the Criminal Code (as re-enacted by 9 & 10 Edw. VII. ch. 10, sec. 3), dealing with betting, wagering, pool-selling, etc., has the right to elect to be tried by a jury, and cannot without his consent be tried summarily by the Police Magistrate.

2. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL—CONSENT.

The jurisdiction to try summarily conferred by Code sec. 773 as to certain indictable offences, is expressly subject to the subsequent provisions of Part XVI., and depends upon the consent of the accused as to all of the offences mentioned in the section, except those as to which, and the cases in which, it is expressly provided that jurisdiction does not depend upon the consent of the person charged.

ARGUED: January 29, 1914.

DECIDED: February 23, 1914.

CASE stated by R. E. Kingsford, Esquire, one of the Police Magistrates for the City of Toronto, under sec. 1014 of the Criminal Code, R.S.C. 1906, ch. 146.

The accused was charged before the Police Magistrate with a contravention of sec. 235 of the Criminal Code, dealing with betting, wagering, pool-selling, etc., and asked leave to elect to be tried by a jury, which was refused because, in the opinion of the Police Magistrate, his jurisdiction to try the accused was absolute without the consent of the accused.

The questions reserved for the opinion of the Court were whether the Police Magistrate had: (1) the right to refuse to allow the accused to elect to be tried by a jury and to try him summarily without his consent; (2) power to inflict a penalty of six months' imprisonment and a fine of \$500 and in default of the payment of the fine of \$500 a further term of six months; (3) power to inflict a heavier penalty than six months' imprisonment and a fine of \$200, as provided by sec. 781 of the Criminal Code, as amended by 3 & 4 Geo. V. ch. 13, sec. 27.

H. E. Rose, K.C., for the accused, argued that the accused had a right of election as to whether he would be tried by a jury or by the magistrate: Criminal Code, R.S.C. 1906, ch. 146, sec. 235, as re-enacted by 9 & 10 Edw. VII. ch. 10, sec. 3. On the question of the magistrate's jurisdiction to dispose of the case summarily and his right to impose a sentence of \$500 and six months' imprisonment and in default of payment of the fine, an additional six months' imprisonment, see secs. 773(g), 776, 777, 778, amended by 8 & 9 Edw. VII. ch. 9, schedules at pp. 114, 115. Sections 774 and 775 are particular exceptions to 773. See *Rex v. Lee Guey* (1907), 15 O.L.R. 235, at pp. 236, 244.

E. Bayly, K.C., for the Crown, argued that sec. 773 of the Code confers a summary jurisdiction upon magistrates: see *Bouvier's Law Dictionary*, tit. "Summary Jurisdiction." Sections 780 and 781 of the Code follow sec. 773, giving the sentences that may be imposed; "absolute" must be distinguished from "summary." Section 780 of the Code cannot be reconciled with the prisoner's contention, and a magistrate trying an accused under sec. 773 is limited in his sentences by sec. 781. *Rex v. Lee Guey*, 15 O.L.R. 235, is upon a different question. If a prisoner is tried with his own consent, he should be tried under sec. 777; if not, secs. 780 and 781 apply. See *Rex v. Smith* (1905), 9 Can. Crim. Cas. 338.

Rose, in reply, referred to the inconsistency between secs. 773 and 777; sec. 771 defines "magistrate." Section 777 is applicable; it applies to more serious offences than are dealt with in secs. 780 and 781.

February 23. The judgment of the Court was delivered by *MEREDITH*, C.J.O. (after stating the case as above):—The first question must, in my opinion, be answered in the negative.

The jurisdiction to try summarily conferred by sec. 773 is, by the terms of the section, "subject to the subsequent provisions of this Part," one of which (sec. 778 (2)) is:—

"If the charge is not one that can be tried summarily without the consent of the accused, the magistrate shall state to the accused—

"(a) that he is charged with the offence, describing it;

“(b) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction” (8 & 9 Edw. VII. ch. 9, schedule, p. 114).

It is clear, therefore, that the ruling of the Police Magistrate was erroneous unless the charge against the accused is “one that can be tried summarily without the consent of the accused,” within the meaning of sub-sec. 2 of sec. 778.

The reference in the sub-section is, I think, plainly to a charge for which, under the provisions of Part XVI. or of some other enactment, jurisdiction to try summarily without the consent of the accused is conferred. Such provisions are found in sec. 774, as enacted by 8 & 9 Edw. VII. ch. 9, sec. 2 (schedule, p. 113); in secs. 774 and 775; and in sub-sec. 5 of sec. 777, as enacted by 8 & 9 Edw. VII. ch. 9, sec. 2; but nowhere in Part XVI. or elsewhere, as far as I have been able to discover, is jurisdiction to try summarily without the consent of the accused, in the case of the offence with which the accused is in this case charged, conferred on the magistrate, except in the case of seafaring persons as provided by sec. 775.

As I understand Mr. Bayly's argument, it is, that sec. 773 confers jurisdiction to try summarily without the consent of the accused for any of the offences mentioned in the section, and that the qualifying words of it have reference to the provisions as to the punishment that may be inflicted, which is less than might be imposed if the accused had been convicted after trial in the ordinary way; and that the object of the provisions making the jurisdiction absolute without the consent of the accused, as to certain of the offences, was to empower the magistrate in those cases to impose the heavier punishments that might have been imposed if the accused had been convicted after trial in the ordinary way.

The construction contended for is not, I think, the natural one, and would lead to the anomalous result that the graver offences mentioned in clauses (c), (d), (e), and (g), might be more lightly punished than the less grave ones mentioned in clauses (a) and (f).

The word "absolute" is used, I think, in the sense of "unconditional," that is to say, not dependent upon the conditions precedent to the right to exercise the jurisdiction which are prescribed by the Act having been complied with, and the words referring to the consent of the accused were added *ex abundanti cautela*. A striking instance of this caution is to be found in sec. 775, which provides not only that the jurisdiction is absolute and does not depend on the consent of the person charged to be tried by the magistrate, but also that such person shall not "be asked whether he consents to be so tried."

In my opinion, the jurisdiction of the magistrate to try summarily, so far as it depends upon any of the provisions of Part XVI., depends upon the consent of the accused as to all of the offences mentioned in sec. 773, except those as to which, and the cases in which, it is expressly provided that jurisdiction does not depend upon the consent of the person charged.

Having come to the conclusion that the first question should be answered in the negative, it is unnecessary to answer the second and third questions.

The result is, that a new trial must be granted, in order that the case may be dealt with as provided by sec. 778, and in accordance with the answer to the first question.

New trial ordered.

[COURT OF KING'S BENCH FOR MANITOBA.]

BEFORE MACDONALD, J.

REX v. ATKINSON.

1. INTOXICATING LIQUORS (§ III E—77) — DRUNKENNESS ON INDIAN RESERVE—INDIAN ACT (CAN.).

An Indian Agent has jurisdiction under the Indian Act, R.S.C. 1906, ch. 81, to try a person who is not an Indian for the offence of being drunk upon an Indian reserve.

2. CRIMINAL LAW (§ IV B—111)—IMPRISONMENT AT HARD LABOUR—SUMMARY CONVICTION UNDER INDIAN ACT (CAN.).

The Indian Act, R.S.C. 1906, ch. 81, does not empower an Indian agent to include hard labour in a sentence of imprisonment imposed on summary conviction under sec. 139 of the Act for being drunk on an Indian reserve.

DECIDED: May 19, 1914.

HABEAS CORPUS motion in respect of a summary conviction under the Indian Act, R.S.C. 1906, ch. 81.

The motion was dismissed on an amendment of the conviction.

D. M. Ormond, for the accused.

J. Allen, for the Crown.

MACDONALD, J.:—This is a motion for *habeas corpus*. The accused was charged with being drunk on the Indian reserve of the Pas band of Indians, contrary to the provisions of section 139 of the Indian Act, ch. 81, R.S.C. 1906. He was summoned before the Indian Agent at The Pas, pleaded guilty and was sentenced to three months' imprisonment in the common gaol of the central judicial district with hard labour. Counsel for the prisoner now contends that the Indian Agent had no jurisdiction.

Section 139 of the Indian Act provides that any constable or peace officer may arrest, without warrant, any person or Indian found drunk, and may detain him until he can be brought before a justice of the peace, etc. The contention of counsel for the prisoner is that only a justice of the peace has jurisdiction. Section 161 of the Act, however, provides that every Indian Agent shall, for the purposes of this Act or of any other Act respecting Indians, and with respect to,

(a) any offence against the provisions of this Act or any other Act respecting Indians; or,

(b) any offence against the provisions of the Criminal Code respecting the inciting of Indians to commit riotous acts; or,

(c) any offence by any Indian or non-treaty Indian against any of the provisions of those parts of the Criminal Code relating to vagrancy and offences against morality;

be *ex officio* a justice of the peace, and have the power and authority of two justices of the peace, anywhere within the territorial limits of his jurisdiction as a justice, etc. This section, however, it is contended, applies only to an Indian, because of the fact that the latter part of the section recites,

whether the Indian or non-treaty Indian charged with or in any way concerned in or affected by the offence, . . . is or is not within his ordinary jurisdiction, charge or supervision as an Indian agent.

If this contention were correct, then, under sub-section (b) any offence against the provisions of the Criminal Code respecting the inciting of Indians must be construed to mean that the inciting must be by Indians. That, I do not think, was the intention of the Act. From my interpretation of the Act, I am of opinion that the Indian Agent has jurisdiction over all offences against the Indian Act, and the offence charged here is clearly within the Act, and the Indian Agent was within his jurisdiction in trying the charge.

The Act does not, however, give him jurisdiction to impose hard labour, and that part of the sentence will have to be eliminated.

The application must be refused.

Conviction amended.

[COURT OF KING'S BENCH, MANITOBA.]

BEFORE CURRAN, J.

REX v. HAGEL and WESTLAKE.

1. WITNESSES (§ II B—43)—CROSS-EXAMINATION IN CRIMINAL CASES—
DIRECTION OF COURT TO CALL ALLEGED ASSOCIATE IN THE OFFENCE.

Where, on charges of assisting a prisoner to escape and of conspiring with the prisoner for that purpose, the indictment is laid without calling before the grand jury the prisoner, who had been re-captured, the trial judge is not bound to give a direction asked by the accused that the prisoner be called as a witness for general cross-examination without making such witness a witness for the accused, nor a direction that the Crown make the prisoner its witness, if the Crown is prepared to permit counsel for the accused to interview such prisoner as to the evidence he can give and offers to facilitate his being called as a witness for the defence if desired.

[*R. v. Holden*, 8 C. & P. 606; *R. v. Stroner*, 1 C. & K. 650, distinguished.]

DECIDED: March 9, 1914.

CRIMINAL trial at the assizes.

One John Krafchenko was committed for trial by the police magistrate at Winnipeg on a charge of murder. That evening

he escaped from the police station. The accused, Percy Hagel and John Westlake, were indicted at the following assizes on two charges: one for conspiring with Krafchenko and others to assist the said Krafchenko in escaping, and one for assisting Krafchenko to escape.

Counsel for the accused raised the question that Krafchenko who was in custody awaiting trial, was an important witness but his name was not placed by the Crown on the back of the indictment and he asked that the Court order that the Crown be directed to call Krafchenko as a witness, or, in the alternative, that the Judge call him and examine him as a witness neither for the Crown nor the defence, but in the interests of justice.

R. A. Bonnar, K.C., and H. D. Cutler, for the accused.

E. Anderson, K.C., and R. B. Graham, for the Crown.

CURRAN, J.:—Counsel for the accused ask for an order from me as the trial Judge at this assize, directing that one John Krafchenko, named in the indictment as one of the confederates of the accused in the alleged conspiracy, be called by the Court as a witness indifferent to either prosecution or defence in the furtherance of justice. It is contended that as this party is alleged to be one of the conspirators, though not indicted or charged as an offender, he must be in possession of some knowledge of the offence and that in the interests of justice he ought to be called by the Court to enable the accused to derive any benefit possible from his cross-examination by their counsel. The Crown refuse to call him and his name is not among the Crown witnesses endorsed upon the indictment, nor was he examined by the Grand Jury.

The following authorities have been cited by counsel for the accused in support of the motion: *Regina v. Holden*, 8 C. & P. 606; *Regina v. Stroner*, 1 Car. & Kir. 650; Roscoe, Crim. Ev., 13th ed., 115. These cases do not, I take it, establish any general principle applicable to all criminal cases. The first was a case of trial for murder. The prisoner and deceased and their families lived in the same house and on a certain night there was a dispute between them and blows passed in the presence

of the wife of the deceased and her daughter. The daughter was not called by the prosecution nor was her name on the back of the indictment, though she was present in Court, having been brought by the defence. Counsel for the prosecution stated to the Court that he did not intend to call her. The learned trial Judge, Patterson, J., said:—

She ought to be called. She was present at the transaction. Every witness who was present at a transaction of *this sort* ought to be called even if they give different accounts; it is fit that the jury should hear their evidence so as to draw their own conclusions as to the real truth of the matter.

The daughter of the deceased was examined. It further appeared that a post mortem examination of the body of the deceased had been made, at which three surgeons, Briant, Mayer and Henderson, attended or took part. Briant and Mayer were called by the prosecution but not Henderson. It further appeared that some difference of opinion existed amongst these surgeons as to the cause of death. Henderson's name was not on the indictment as a Crown witness, but he was present in Court. The learned trial Judge said:—

As he is in Court I shall insist on his being examined. He is a material witness who is not called on the part of the prosecution, and as he is in Court I shall call him for the furtherance of justice.

Henderson was then called and examined by the learned Judge himself.

The other case was one of rape, tried before Lord Chief Baron Pollock, at the Shrewsbury assizes. The prosecutrix swore that almost immediately after the commission of the offence she complained of it to her employer's wife, a Mrs. Smith, and shewed Mrs. Smith some blood in the cowhouse where the offence was alleged to have taken place and that Mrs. Smith said 'Pooh.' She further stated that on the day following the offence her clothes were washed by a washerwoman named Chetwood and that these clothes had blood upon them. Neither Mrs. Smith nor the washerwoman had been bound over to give evidence and their names were not upon the back of the indictment. Both parties were in attendance at the trial as witnesses for the defence. The learned Judge, upon being apprised of this said:—

They must be both called as witnesses *for the prosecution*, but I shall allow the counsel for the prosecution every latitude in examining them.

Roscoe, *Crim. Evid.*, 13th ed., at p. 115, says:—

A Judge has power to call and examine a witness who has not been called by either of the parties and if he does so neither party can cross-examine without the Judge's leave. Such leave ought, however, to be granted if the evidence given is adverse to either party but the cross-examination should be confined to the answers given and a general cross-examination should not be permitted.

This latter relief is not, however, what the counsel for the accused wishes. He wants the person named called and put in the box for general cross-examination without in any way making such person his own witness. It is not, as I understand the object of the motion, that the trial Judge should call the witness and examine him himself and limit cross-examination to matters arising out of the answers so given. The question then is, are the two cases cited any authority for the order sought? I do not think they are, at all events, sufficient authority to warrant my departing from the usual practice. The Crown has offered to permit counsel for the defence free access to the proposed witness who is now confined in the Provincial Gaol at Winnipeg upon a commitment for the crime of murder, and awaiting his trial at the Morden assizes, which will be held on the 10th instant. I suggested this course to the accused's counsel as he had previously alleged as a reason for making the motion that he was denied access to this man and did not know and had no means of knowing what evidence he would give if called, and he therefore did not feel justified in calling and making this man a witness for the defence. To obviate this difficulty counsel for the Crown made the offer I have just referred to, upon which counsel for the accused said he did not, for personal reasons, wish to go near the party or have anything to say to him, but insisted that the Court ought to call Krafchenko and have him put in the witness-box for full cross-examination by the defence.

Now, I think the circumstances here are very different from those which existed in the cases cited. Here the proposed witness is implicated directly in the offence charged against the accused and though not indicted with them might have been.

The witnesses referred to in the cases cited were in no way connected with the offences charged. In the one case the daughter and her mother were the only spectators of the crime, and as such manifestly both ought to have been called by the Crown. All of the medical men who assisted at the post mortem though differing in opinion as to the cause of death should, in fairness to the accused, also have been called by the Crown. In the other case it is apparent that the Crown officers did not wish to call the woman Smith fearing, if the fact was not actually known to them, that she would deny the complaint and so weaken their case, which actually happened, resulting in an acquittal. Neither Mrs. Smith nor the washerwoman were in the remotest degree implicated in the offence charged. They were both perfectly indifferent witnesses who, under the circumstances of the case, ought to have corroborated the testimony of the prosecutrix in a very important matter, that of her prompt complaint of the outrage and condition of her clothing if the story told by the prosecutrix was true. In such a case ought not the Crown, in justice to the accused, and to the end that the truth might be elicited, have called these parties? I think so, but can these cases be held to establish generally in all criminal cases the right of an accused person to invoke the special intervention of the Court on the general ground of the furtherance of justice when the ordinary means of conducting his defence are fully open to him. I do not think so.

I have no means of knowing what evidence Krafchenko can or will give. He may deny all knowledge of the alleged conspiracy or may freely admit it and implicate the accused. The Crown is the best judge of how it will prove its case. The trial Judge has no right to interfere with this judgment, and I certainly would have no right to direct the Crown in such a case as this to make Krafchenko their witness. Apparently the Crown thinks it can establish its case without Krafchenko's evidence or it would call him. If the defence wants him as a witness he is freely available to them. Had the Crown not made the offer of access, I would have felt differently about the matter and there would then have been reasonable ground for the request.

As it is, Mr. Anderson, representing the Crown has offered to detain Krafchenko here long enough to permit the accused's

counsel to interview him, and if desired, call him as a witness for the defence at the opening of the trial to-day or within such reasonable time, having regard to the trial of Krafchenko at Morden, as can be allowed. This arrangement seems to me to be eminently fair and one which fully meets the demands of justice to the accused. There is no reason, in my judgment, for departing in this case from the usual order of procedure in criminal cases, and I therefore deny the motion.

I do this upon the assumption that the offer made by the Crown still holds good and is fully implemented to the end that the accused's counsel may have ample opportunity of interviewing John Krafchenko and ascertaining what evidence, if any, he can give upon this trial, and so determining, as is their undoubted right, whether or not to call him as a witness on their behalf. If this is not permitted then the order asked for may be made upon further application.

Ruling accordingly.

[CIRCUIT COURT OF QUEBEC.]

BEFORE McCORKILL, J.S.C.

CORRIVEAU v. SIMARD.

1. INTOXICATING LIQUORS (§ III A—56)—UNLAWFUL SALES—TEMPERANCE DRINKS—INTOXICATING PRINCIPLE—QUEBEC LICENSE LAW.

The selling of so-called temperance drinks is within the prohibition of the Quebec License law if they contain any intoxicating principle; evidence that the liquor in question contained from three to five per cent of proof alcohol and that this would intoxicate is sufficient upon which to base a conviction without proof that intoxication had resulted from the sales made.

DECIDED: February 13, 1914.

PROSECUTION under article 1112 R.S.Q. 1909 for having sold intoxicating liquor without a license.

McCORKILL, J.:—Plaintiff proved by certain witnesses that they bought some bottles of what was called "temperance beer" and "porter," part of which they consumed, and two of which

they entrusted to a chemist, Abbé Filion, of Laval University, for analysis. Abbé Filion testified that one of the bottles contained 4.80 per cent. of proof alcohol and the other 3 per cent., and that both were intoxicating, although it would take a large quantity possibly of the 3 per cent. beer to intoxicate a person.

One of the witnesses for plaintiff testified that he felt the effects of drinking it. Several witnesses were examined by defendant to prove they had been in the habit of buying and consuming this temperance beer and porter and that it never intoxicated them. One of the witnesses testified that he would have become sick from drinking a large quantity rather than intoxicated. I may say that most of the defendant's witnesses were, if one might judge from their personal appearance, veterans of the bar (saloon bar, I mean) of various ages.

The enactments of the license law have not been specially placed upon our statutes for the protection of veteran drinkers alone; it is for the protection of children and others who have no desire to consume intoxicating liquors.

A liquid placed in a bottle, labelled as a temperance drink, leads unwary to believe that it is really what it pretends to be. If it contains an intoxicating principle as an ingredient, it is a legal fraud.

The license law defines what temperance liquors are:—

“All kinds of syrups and other similar liquids or beverages, simple or mixed, in which there is no intoxicating principle.” (R.S.Q. 904, sec. 2.)

It also defines intoxicating liquors as: “All liquors, containing an intoxicating principle (R.S.Q. 904, sec. 1.)”

The standard of strength of intoxicating liquors, which allows a certain percentage of proof spirits, in the criminal law, also falls below the standard of the temperance beer in question, 6-7 Edw. VII. ch. 9, amending the Criminal Code, ch. 146, R.C. C. 1906, sec. 2, declaring that all liquors containing more than 2½ per cent. of proof spirits shall be presumed to be intoxicating.

It might be contended under this definition, that proof might be made as to whether 2½ per cent. of proof spirits is

really an intoxicating liquor under the Dominion law. It is not so under the Quebec license law.

In my opinion, all that had to be established by the prosecutor in this case was that the so-called temperance beer contained an intoxicating principle, in order to bring the act of selling it within R.S.Q. 1009.

I do not need to decide as between the plaintiff's witnesses and defendant's, whether this temperance beer, so-called, would intoxicate or not. It is a well-known fact that some people become intoxicated after drinking a very small quantity of intoxicating liquor, whereas other people can consume a very large quantity without apparent effect.

This action is taken under the license law. The definitions which I have just given of an intoxicating drink and of a temperance drink, shew clearly that the temperance beers which were sold by the defendant, to the plaintiff's witnesses, on the date in question, were not temperance beverages because they contained a principal of intoxication; they were therefore intoxicating liquors within the license law.

Judge Cimon, in the case of *Langis v. Huart*, 13 R. de J. 458, discussing the difference between intoxicating liquors and temperance liquors, says, at page 462:—

“La distinction entre les liqueurs enivrantes et les liqueurs de tempérance se réduit à celle-ci : les premières sont celles qui contiennent un principe enivrant, tandis que toutes les liqueurs qui ne contiennent pas un principe enivrant sont de tempérance.”

These so-called temperance beers contained 3 per cent. and 4.80 per cent. of alcohol, respectively. Abbé Filion swore that all degrees of alcohol contributed to drunkenness.

In my opinion, therefore, plaintiff's action is well founded.

Under the circumstances, the defendant is condemned to the minimum fine of \$50 and costs, and, in default of payment, to imprisonment for three months.

Fine imposed.

[SUPREME COURT OF ONTARIO.]

APPELLATE DIVISION.

BEFORE SIR WILLIAM RALPH MEREDITH, C.J.O., MACLAREN,
MAGEE, AND HODGINS, J.J.A., AND LATCHFORD, J.

REX v. FONTAINE.

WITNESSES (§ III—58)—CORROBORATION—CRIMINAL CHARGE—INDECENT
ASSAULT.

CROWN case reserved by the police magistrate of Cobalt on a conviction upon summary trial for indecent assault on a female.

The evidence accompanied the stated case, and the questions submitted were:—

1. Whether, upon the evidence summarized in the stated case, there was sufficient corroboration to satisfy section 1003 sub-sec. 2 of the Criminal Code.
2. Whether the matters related in the evidence of Ida McC. disclose an offence under sec. 292 of the Criminal Code.
3. Whether there is sufficient competent evidence to sustain the conviction.

TORONTO, June 5, 1914.

W. J. Tremear, for the prisoner.

J. R. Cartwright, K.C., Deputy Attorney-General, for the Crown.

THE COURT delivered an oral judgment at the conclusion of the argument, holding that there was sufficient corroboration without considering the objection raised that the testimony not under oath of one child could not be corroboration under Cr. Code sec. 1002 of the testimony of another child similarly taken without oath under sec. 1003. The accused having given evidence on his own behalf, his evidence could be looked at for the statutory corroboration, and such corroboration might consist

of a circumstance admitted by the accused to which he offered an explanation of an exculpatory character but which was of an implicating character, were the testimony of the prosecutrix believed, where the Court was of opinion that the explanation offered by the accused was an unreasonable one.

An indecent assault, although not of a serious kind, was disclosed on the evidence and all questions must be answered in the affirmative, and the conviction affirmed. Sentence had been deferred and there would be a recommendation to the Attorney-General and the magistrate to consider whether the imprisonment pending the trial and the appeal (the accused not having been able to furnish bail) was not a sufficient punishment.

Conviction affirmed.

[TERRITORIAL COURT OF THE YUKON TERRITORY.]

BEFORE MACAULAY, J.

REX v. GILLIS.

1. ESTOPPEL (§ III J—130)—INCONSISTENT ACTS IN JUDICIAL PROCEEDING
—CRIMINAL LAW—PLEA OF GUILTY AS BAR TO FUTURE CONTEST OF
FACTS ON APPEAL.

A plea of guilty operates as an estoppel against the accused from calling upon the prosecution to produce evidence to establish that he is guilty, and *quod* the facts alleged in the information or indictment, he is barred from a trial *de novo* which in certain cases is available on an appeal from two justices holding a summary trial on notice of appeal being given by a person aggrieved (Code secs. 749 and 797, as amended in 1913); any objection to be taken must then be to the form of the conviction.

[*R. v. Bowman*, 2 Can. Cr. Cas. 89; *R. v. Baird*, 13 Can. Cr. Cas. 240, and *Upton v. Brown*, 21 Can. Cr. Cas. 190, considered.]

APPEAL from a summary conviction made on a plea of guilty.
The appeal was dismissed.

J. A. W. O'Neill, for appellant.

J. P. Smith, for the Crown.

DECIDED: July 6, 1914.

MACAULAY, J.:—The appellant in this case pleaded “guilty” before J. D. Moodie, Esquire, a commissioned officer of Royal North-West Mounted Police, having, possessing and exercising all the powers of two justices of the peace within the Yukon Territory, on the 26th day of May, 1914, to the charge of having resisted a peace officer within the meaning of the Criminal Code of Canada in the lawful execution of his duty, contrary to the provisions of section 169 of the Criminal Code, and was sentenced by the said J. D. Moodie to 14 days’ imprisonment at hard labour.

He now appeals from the said conviction under the provisions of section 749 of the Criminal Code.

Counsel for the appellant claims the right to a trial *de novo* and that the respondent should be called upon, and that it was incumbent upon him to prove the appellant guilty of the offence charged.

I am of opinion, following the cases of *R. v. Brook*, 7 Can. Cr. Cas. 216, and *Harrop v. Bayley*, 6 El. & Bl. 218, that under his plea of guilty the appellant is estopped from calling upon the respondent to produce evidence to establish that he is guilty of the offence with which he is charged, and so far as the facts relating to his guilt or innocence are concerned he is not a person who thinks himself aggrieved within the meaning of section 749 of the Criminal Code of Canada. See also *R. v. Bowman*, 2 Can. Cr. Cas. 89; *R. v. McNutt*, 4 Can. Cr. Cas. 392; *R. v. Baird*, 13 Can. Cr. Cas. 240; *Upton v. Brown*, 21 Can. Cr. Cas. 190; also *R. v. Goulet*, 12 Can. Cr. Cas. 365.

No objection is taken on the appeal to the conviction as to its form.

The only other question raised was as to the excessive punishment imposed by the said justice. The maximum penalty which could have been imposed would have been six months’ imprisonment at hard labour or a fine of one hundred dollars, and I am unable to say that the justice acted oppressively in this case, or imposed an excessive sentence upon the appellant by sentencing him to 14 days’ imprisonment at hard labour.

The appeal, therefore, should be dismissed.

Appeal dismissed.

[SUPREME COURT OF ONTARIO.]

HIGH COURT DIVISION.

BEFORE MEREDITH, C.J.C.P., IN CHAMBERS.

Re ELLIOTT.**1. CERTIORARI (§ II—16)—NOTICE OF MOTION TO QUASH CONVICTION—TIME LIMIT.**

The onus is upon the party moving to quash a summary conviction under the Liquor License Act (Ont.) to prove that notice of the motion was served on the magistrates within twenty days from the date of conviction as required by sec. 95 of the revised Act, R.S.O. 1914, ch. 215, formerly 9 Edw. VII. ch. 82, sec. 25.

2. CERTIORARI (§ II—40)—WAIVER—NOTICE OF MOTION SERVED TOO LATE—ENLARGEMENT OF MOTION BY CONSENT.

The enlargement by consent of a motion to quash a summary conviction under the Liquor License Act (Ont.) and the demanding by the respondent of copies of affidavits in support, do not operate as a waiver by the prosecutor of a preliminary objection that the notice of motion was served too late, even if it were possible for the prosecutor to waive the statutory requirement.

[*R. v. Whitaker* (1894), 24 O.R. 437, distinguished; *R. v. How*, 11 A. & E. 159, applied.]

ARGUED: January 27, 1914.

DECIDED: February 21, 1914.

MOTION by Joseph Elliott to quash his conviction by two magistrates for an offence against the Liquor License Act, on the prosecution of Robert Morrison.

M. H. Roach, for the prosecutor, took the preliminary objection that the motion was out of time.

J. B. Mackenzie, for the applicant.

February 21. MEREDITH, C.J.C.P.:—The single question for consideration now is whether the Court has power to hear this motion.

The respondent asserts that it is out of time, and so of no effect.

The applicant contends (1) that it is in time, and that, if it were not, (2) that objection has been waived.

The notice given is of a motion to quash a conviction of an offence committed "contrary to the provisions of the Liquor License Act:" the recognizance entered into by the applicant is to prosecute "a notice of motion" to quash "a conviction under the Liquor License Act:" and the conviction was of an offence committed "contrary to the provisions of the Liquor License Act;" the information also containing the like words.

In sec. 25, ch. 82, 9 Edw. VII. Ontario, "An Act to amend the Liquor License Act," a special limitation was put upon the time within which a motion to quash a conviction made under the Liquor License Act could be heard: the section is in these words: "No motion to quash a conviction or order made under this Act shall be heard by the Court or Judge to which such application is made unless notice of such motion has been served within twenty days from the date of the conviction or order."

It was admitted, on all hands, that service of the notice of this motion, upon each of the two magistrates who made the conviction, as well as upon the prosecutor, was necessary; and that the 24th day of July was the last of the twenty days "from the date of the conviction."

But it was contended, for the applicant, that there was no power to make any such conviction under the Liquor License Act; and, therefore, the case could not come within the meaning of the legislation I have read. But why not? Good, or bad, it is a conviction expressly made under the Act. The information was laid, and the whole prosecution carried on, under and in accordance with its provisions, for an offence throughout expressly stated to have been committed in contravention of the provisions of the Act; and, now, the whole proceedings, taken on this motion, have been taken expressly to quash a conviction for an offence committed "contrary to the provisions of the Liquor License Act." I am unable to find anything substantial in this point, and so must deal with the case as one within the meaning of such legislation: see *People ex rel. Springsted v. Trustees of Village of Cobleskill* (1892), 20 N.Y. Supp. 920; and *People ex rel. Cook v. Hildreth* (1891), 126 N.Y. 360.

The onus of proof of service of the notice of motion is upon the applicant, but he has failed to give any direct evidence of service upon any one but the prosecutor.

His story is, that the notices reached him on the morning of the 24th day of July, and that he then served one copy upon the prosecutor; gave another copy to a girl in Beaverton to give to one of the magistrates, near whom she lived, a long way from Beaverton; and the third to another girl, in Beaverton, to give to the other magistrate, with whom she lived, and for whom she was working, also some considerable distance from Beaverton. He also asserts something as to what was told to him afterward by these girls; but that is not evidence.

To ask a finding of due service upon any such evidence is extremely unreasonable. According to the applicant's assertions, in the several affidavits made by him, he knew that the 24th day of July was the last day for service of the notices; and yet, although he seems to have had time enough, if his story be true, to shew the notices to his son and to the two men engaged in digging a ditch, he was content to take his chances that each of these girls would effect service for him, and also prove the service.

It was the applicant's duty to have proved due service, if it were really effected, by these girls. If an affidavit could not be obtained, they might have been examined in the usual way. But no proof of that character has been made on this motion. The applicant seems rather to rely upon the result of his own carelessness as excusing him; when in fairness it ought rather to condemn him.

The magistrate McRae was examined by the applicant as a witness; and the girl to whom the notice was given to give to him, after that examination, made an affidavit at the applicant's instance, which, instead of relating what she did with the notice, and when, is confined to a circumstantial assertion that it was not on the 25th, but was on the 24th, when she got the paper.

It might, perhaps, upon the whole evidence, be found that this notice came to the hands of this magistrate on the even-

ing of the 24th day of July; but that would not end the matter; for I am quite unable to find that service was effected on the other magistrate in time.

The magistrate McLennan, in his affidavit, asserts that the notice reached him on the 25th July; and his wife, in her affidavit, circumstantially corroborates him. If her statements be true, it must have been in the morning next after that on which the paper was given to the girl that the paper was found in the satchel, for it was found in the morning before she had started out on her morning's journey.

So that I must find that the provisions of the enactment limiting the time within which such a motion as this may be made have not been observed.

But it is contended that there has been a waiver of the objection: (1) in asking an enlargement of the motion; and (2) in demanding copies of the affidavits filed in support of it.

In regard to the delay, the entries in the official books shew that the adjournments were by consent; and it is admitted that, except in the first instances, they were almost, if not quite, all for the convenience of the applicant's solicitor, who went to England while the motion was pending.

But why should a mere enlargement of the motion indicate an intention to waive an objection of this character? It would generally be necessary. The respondent would need to find out what evidence there was of service, and then to meet it, and I may add that it was not until the month of January, 1914, that all the affidavits on behalf of the applicant, on this question of service of the notice of motion, were made.

It is difficult for me to understand how the point could be seriously made; and I need say no more upon the subject than read the words of Lord Denman, C.J., in dealing with the same point in the case of *Regina v. How* (1840), 11 A. & E. 159: "I think it too much to contend that the enlargement of the rule cures the objection; such a point was, I believe, never made before."

That which I have said covers also the point regarding the demand of copies of the affidavits in support of the motion. The respondent might have demanded copies of the affidavits affecting the question of service only; but, if he had done so, he might afterwards have been told that he was unduly increasing the costs. In a majority of cases, perhaps, the preliminary objections and the merits are argued at the one time. So that, all things considered, there is no substantial ground upon which any waiver in this respect can be based. If the respondent asked and got more than was necessary, the taxing officer will see that he shall take no advantage by it.

Nor can I think this is a case in which there could be any such waiver.

Any one may, of course, waive a statutory benefit in his favour. But the enactment in question is not one passed for the benefit or relief of prosecutor or magistrate, and very certainly not for that purpose only. It is one of those changes, made from time to time, in the liquor license laws of this Province, to render them more stringent, and harder to evade; changes generally made at the instance of those who are strongly opposed to the sale or use of intoxicating liquors at all, and changes which such persons, rightly or wrongly, believe to be, and seek, entirely in the public interests.

The case *The Queen v. Whitaker* (1894), 24 O.R. 437, was a case quite different from this case in several material respects. It was the case of a private prosecution for breach of a municipal by-law; and the preliminary objection was not that the application to quash was out of time, but was only that the magistrate had not had full six days' notice of the application for the writ of *certiorari*; and so it may have been a case in which there might have been a waiver of the objection; and, in the peculiar circumstances of that case, differing as they did widely from those of this case, it was held that there had been a waiver. There does not seem to have been any interposition of the Crown in it at any time, though it is reported as *The Queen v. Whitaker*.

Whether it is right to do so in all cases, I need not consider; see secs. 129 and 134 of the Liquor License Act; for, right or wrong, the fact is that prosecutions under the liquor license enactments of this Province are commonly styled and treated as if Crown cases; a Crown officer, or counsel for the provincial Attorney-General, generally opposing such motions as this: a manner of proceeding which the applicant in this case has stamped with his concurrence in the style of the cause in all his proceedings—*The King v. Elliott*—though there is no evidence before me of the interposition of any Crown officer in his case. If really a Crown case, the question of waiver may assume a very different character from that arising in the case of entirely a private prosecution.

The motion must be dismissed, because out of time, with costs of success upon that ground only. The conviction, and papers brought up with it, will be dealt with in the usual way, so that the conviction may be enforced.

Motion dismissed.

[SUPREME COURT OF ONTARIO.]

HIGH COURT DIVISION.

BEFORE MIDDLETON, J., IN CHAMBERS.

REX v. NERO.

1. INTOXICATING LIQUORS (§ III G—89)—KEEPING FOR SALE—STATUTORY PRESUMPTIONS.

The mere finding of liquor does not create a statutory presumption that liquor is kept for sale on the premises unless the special circumstances stated in sec. 102 of the revised Act, R.S.O. 1914, ch. 215, are shewn to exist, for example, the maintenance of a bar.

DECIDED: June 4, 1914.

MOTION by the defendant for an order quashing a conviction of the defendant by a magistrate for having intoxicating liquors

on his premises for sale, without having a license to sell, contrary to the Liquor License Act.

F. W. Griffith, for the defendant.

J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—The motion was made before me, on the return of the notice on the 24th April, for an order quashing the conviction. On that day, owing to some misunderstanding, the Crown was not represented, nor were any papers returned. The papers have now been handed to me by Mr. Cartwright, who tells me that he agrees that the conviction cannot be supported.

The charge was having liquors for sale without a license. The only evidence was the finding of certain bottles containing beer, and certain bottles that had contained beer, in the barn of the accused. It was objected that there was no evidence that the liquor found was intoxicating, and that there was no evidence to shew that the liquor, such as it was, was kept for sale. The magistrate held that the seals on the bottles were sufficient evidence of the intoxicating nature of the liquor contained in them, and also held that the onus was upon the accused under sec. 111 of the statute. The magistrate was quite wrong in holding that this section applies here. The section relates only to the finding of liquor in a bar or upon premises where there is a sign or a display indicating that liquor is for sale.

Section 109, also relied upon, has no application. That dispenses with proof of payment of money if the magistrate is satisfied that there was a transaction in the nature of a sale. Nowhere in the statute is there found anything to justify the presumption that liquor is kept for sale merely from the finding of the liquor, unless found in a bar.

I find nothing to indicate that the magistrate did not act in good faith; and so, while I quash the conviction and direct repayment of the fine and costs, I make an order for the protection of the magistrate, and give no costs of this motion.

Conviction quashed.

[PRINCE ALBERT DISTRICT COURT,
SASKATCHEWAN.]

BEFORE HIS HONOUR JUDGE DOAK.

O'SULLIVAN v. MICHUS.

1. INTOXICATING LIQUORS (§ III A—59)—UNLAWFUL SALES—LIABILITY OF PROPRIETOR OR OCCUPANT—EMPLOYEE ACTING AS CUSTOMER'S AGENT TO BUY.

Illegal sale of intoxicating liquors on unlicensed premises is not made out against a restaurant proprietor where his employee merely acts as the agent of the customer in going out at the latter's request to buy liquors to be consumed in the restaurant and receives for that purpose the exact amount disbursed or to be disbursed, where the consumption of liquor in restaurants not having liquor licenses was not in itself illegal nor did the circumstances disclose any attempt at evasion of the liquor laws.

[*R. v. Begeotas*, 22 Can. Cr. Cas. 113, 8 D.L.R. 1032, approved; *R. v. Davis*, 22 Can. Cr. Cas. 187, 8 D.L.R. 1046, 4 O.W.N 358, and *Jeffries v. Alexander*, 31 L.J. Ch. 14, referred to.]

DECIDED: July 29, 1914.

APPEAL from an order made by the Police Magistrate of North Battleford dismissing a complaint against the respondent for selling liquor contrary to sec. 86 of the Liquor License Act, Sask.

The appeal was dismissed.

W. W. Livingstone, for appellant.

A. M. Panton, K.C., for respondent.

JUDGE DOAK:—The facts of the matter appear from the evidence to be as follows: On the evening of February 20th, 1914, two provincial police constables named Rash and Brown went to the Savoy Cafe, a restaurant in the City of North Battleford kept by the respondent ostensibly for the purposes of procuring a meal. They sat down at one of the tables and gave the waiter who attended them an order. After turning in the order the waiter returned to the dining room and before the meal had been served to Rash and his companion they called the waiter to their table, and asked him if they could get something to drink.

Upon his replying in the affirmative they asked him to get a dollar's worth of beer.

The waiter thereupon left the restaurant, went to the Metropole Hotel, which is a licensed premises nearby, procured three bottles of beer, for which he paid the bartender a dollar, returned with the three bottles and delivered them to Rash and his companions. There is some conflict in the evidence at this juncture as to whether the waiter received the money for the beer before or after he went to the Metropole Hotel, but I do not think the conflict on this point very material.

The appellant asks me to find the respondent guilty of selling liquor without a license, and advances in support thereof the following reasons:—

1st. That what took place between the respondent's servant and the two constables actually constituted a sale in fact.

2nd. That if there was no actual sale there was an intention to evade the Act, and the respondent through the act of his employee is, therefore, as guilty as if there had actually been a sale.

With reference to the appellant's first contention it seems to me that the reasoning in the case of *R. v. Begeotas*, 8 D.L.R. 1032, 22 Can. Cr. Cas. 113, is conclusive and I fully agree with it.

That was a case decided in British Columbia upon almost identical facts, and upon practically an identical statute.

The same conclusion was reached in Ontario in *R. v. Davis*, 8 D.L.R. 1046, 4 O.W.N. 358, 22 Can. Cr. Cas. 187.

The waiter in procuring the liquor in the present case was acting solely as the agent of the persons who ordered it, and in my opinion it makes no difference upon the question of agency whether the waiter received the money for it before or after he had procured it.

Coming now to the appellant's second contention; it is quite clear that if what took place actually constituted a sale then there would be a violation of the Act irrespective of what the parties' respective intentions had been. But if what took place was not actually a sale then the question of intention would become important. If the respondent through his employee did what he did with the intention of evading the statute, then his act, although innocent in itself, would, if coupled with such in-

tention aforesaid, achieve indirectly that which had been prohibited and would constitute a violation of the statute.

The law upon this point is stated by Blackburn, J., in *Jeffries v. Alexander*, 31 L.J. Ch. 14, as follows:—

The principle as I understand it is that whenever it can be shewn that the acts of the parties are adopted for the purpose of effecting a thing which is prohibited and the thing prohibited is in consequence effected, the parties have done that which they purposely caused, though they may have done it indirectly and endeavoured to conceal that they have done so.

In applying these principles to the present case, then, I should, in order to find the respondent guilty, have to be satisfied that the acts of the respondent's employee were adopted with intention of evading the Act.

I may say at once that here I can find no evidence of any such intention, nor any evidence from which such an intention could be inferred.

In coming to this decision I am fully awake to the danger which exists in allowing liquor to be consumed upon unlicensed premises, of enabling the proprietors of restaurants and other similar places to evade the statute. The consumption upon the unlicensed premises is, however, not prohibited by law, and it must depend in each case upon the attendant circumstances whether there has been any attempt at evasion.

The appeal in the present case will be dismissed with costs.

Appeal dismissed.

[COURT OF KING'S BENCH, QUEBEC.]

(APPEAL SIDE.)

BEFORE ARCHAMBEAULT, C.J., TRENHOLME, LAVERGNE, CARROLL,
AND GERVAIS, JJ.

REX v. LEMELIN.

DECIDED: November 30, 1912.

APPEAL (§ IX—720)—LEAVE TO APPEAL—CONVICTION—SUFFICIENCY OF PARTICULARS.

MOTION for leave to appeal from a conviction for theft on the ground that the indictment was too vague, and insufficiently particularized.

Nicol, for the Crown.

C. C. Cabana, for the accused.

The opinion of the Court was delivered by Mr. Justice Lavergne.

LAVERGNE, J., said that the indictment disclosed the date of the offence, the name of the person from whom the money was stolen, and the amount stolen. Such indictment disclosed the offence charged quite sufficiently to enable the accuser to defend himself properly.

Leave to appeal would be refused.

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE HAULTAIN, C.J.

REX v. MORTON.

1. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL—JURISDICTION ABSOLUTE IN CERTAIN PROVINCES.

Two justices have absolute jurisdiction in Saskatchewan under Cr. Code, sec. 776, to summarily try a charge of inflicting grievous bodily harm.

[*R. v. Hostetter*, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363, followed.]

2. CRIMINAL LAW (§ IV B—111)—SENTENCE AND IMPRISONMENT — HARD LABOUR.

Where both fine and imprisonment are imposed on a summary trial for an offence within Cr. Code sec. 781 (amendment of 1913), hard labour may be imposed at the discretion of the justices as an incident to the imprisonment.

[*R. v. Burtress*, 3 Can. Cr. Cas. 536, referred to.]

DECIDED: October 6, 1913.

MOTION to quash a conviction on summary trial before two justices under Cr. Code sec. 773.

The accused was tried and convicted before two justices of the peace for having inflicted grievous bodily harm, and was by

them sentenced to two months' imprisonment with hard labour, and to pay a fine of fifty dollars and costs. A motion was made by his solicitors for the quashing of the conviction upon two grounds—

(a) That the justices had no jurisdiction to hear the case.

(b) That in any event the sentence was in excess of their jurisdiction.

Allan, Gordon, Bryant, & Gordon, solicitors for the accused.
H. E. Sampson, for the Crown.

HAULTAIN, C.J.:—Following *R. v. Hostetter*, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363, and *R. v. Zyla*, 17 W.L.R. 258, I hold that the magistrates had jurisdiction under sec. 773, Criminal Code, to try the offence charged.

As to the punishment the magistrates, under sec. 781 Criminal Code (amendment of 1913), may impose imprisonment with or without hard labour for a term not exceeding six months or a fine not exceeding, with costs, two hundred dollars or "both fine and imprisonment, not exceeding the said sum and term."

The objection is taken that where both fine and imprisonment are imposed, the imprisonment must be without hard labour. In my opinion "imprisonment not exceeding the said term" means imprisonment of the same character as is mentioned in the earlier part of the section, that is imprisonment with or without hard labour. *R. v. Burtress*, 3 Can. Cr. Cas. 536. In any event, section 1057 of the Criminal Code gives absolute discretion as to hard labour or not in the case of convictions under part XVI. of the Code.

The application must therefore be refused and the conviction will stand. There will be no costs.

Conviction affirmed.

Nicol, for the Crown.

C. C. Cabana, for the accused.

THE YUKON TERRITORY.]

The opinion of the C
Lavergne.

MACAULAY, J.

REX v. SULLIVAN.

LAVERGNE, J.

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RECOGNIZANCE (§ I—30)—NOTICE TO SURETIES—DEFAULT OF
CRIMINAL LAW.
A preliminary notice to the sureties is required in the Yukon
Territory under the English Crown Rules or otherwise on estreating
bail given by the accused.
[*R. v. Creelman*, 25 N.S.R. 404; *Re Barrett's bail*, 7 Can. Cr. Cas.
1. 36 N.S.R. 135, and *Re Burns' bail*, 17 Can. Cr. Cas. 292, con-
sidered.]

2. BAIL AND RECOGNIZANCE (§ I—35)—ADJOURNMENT OF PRELIMINARY EN-
QUIRY BY CONSENT FOR MORE THAN EIGHT DAYS—WAIVER.

The sureties to a recognizance of bail expressly given for an ad-
journment of a preliminary enquiry by consent, for longer than the
eight days provided by Code sec. 679, are not released for non-con-
formity with the statutory direction that adjournments shall not be
for more than eight days, that being a matter of procedure only
which it was competent for the parties to waive, if indeed the statu-
tory direction applies at all where bail is given.

[*Re Burns' bail*, 17 Can. Cr. Cas. 292, and *R. v. Hazen*, 20 A.R.
(Ont.) 663, applied; *Dick v. The King*, 19 Can. Cr. Cas. 44, con-
sidered.]

3. BAIL AND RECOGNIZANCE (§ I—11)—ENFORCEMENT AND ESTREAT OF RE-
COGNIZANCE—CALLING THE BAIL—CERTIFICATE OF DEFAULT.

Where bail was given for the accused's appearance on a fixed date
and he defaulted, failure to call the bondsmen three times within and
three times without the court-room, will not invalidate a certificate
of default and the subsequent estreat of the recognizance, where it was
shewn that the bondsmen were not in court on the date fixed for ap-
pearance.

DECIDED: July 6, 1914.

MOTION to estreat a recognizance.

J. P. Smith, for clerk of Territorial Court and the Crown.

C. W. C. Tabor, for the sureties.

MACAULAY, J.:—This is an application made on behalf of
the Clerk of the Territorial Court of the Yukon Territory and
on behalf of the Crown, before the Court at its sittings for the

trial of criminal cases at the court house, Dawson, on the 1st day of June, 1914, and enlarged from time to time until the 29th day of June, 1914, when argument was heard, for an Order estreating the recognizance entered into by the accused Daniel Sullivan as principal and P. R. McGill and Daniel J. Cronin as sureties dated the 20th day of April, 1914, taken and acknowledged before E. Telford, a Justice of the Peace for the Yukon Territory, the said Daniel Sullivan having been charged before a Justice of the Peace for the Yukon Territory on the 20th day of April, 1914, with having on the 17th day of April, 1914, unlawfully assaulted one Patrick Duggan by stabbing him on the arm with a knife thereby causing grievous bodily harm. The condition of the said recognizance was for the appearance of the said Daniel Sullivan on the 27th day of April, 1914, at the Police Court, Dawson, to answer to the said charge, and to be further dealt with according to law, and not to depart from the said Court without leave, and to further appear before the said Justice or such other Justice or Justices of the Peace as should then be there from time to time thereafter and at such time and such place to which the hearing of the said charge and examination of witnesses in that behalf might be further adjourned, then the said recognizance to be void, otherwise to stand in full force and virtue.

The grounds for the above application are, that on the 11th day of May, 1914, a day and date to which the hearing of the said charge was duly adjourned, the said charge having been called for hearing by John Douglas Moodie, a commissioned officer of the Royal North West Mounted Police having, possessing and exercising all the powers of two justices of the peace within the Yukon Territory, who was then sitting in the said capacity in the police Court at Dawson for the hearing of charges to be heard in said Court, and when the said charge was called for hearing the accused, Daniel Sullivan, failed to appear before the said Justice, and the said Justice endorsed on the recognizance of bail herein the certificate prescribed by the Criminal Code of Canada in such case, namely: the certificate prescribed by form 73 of the said Criminal Code.

The material filed on the application, amongst other things, shews the certificate endorsed on the recognizance as prescribed by the form 73 of the Criminal Code; the transmission of the recognizance to the clerk of the Territorial Court of the Yukon Territory by John Douglas Moodie, the justice presiding in the said Court, and a return made by the clerk of the said Police Court and the said John Douglas Moodie, the justice presiding in said Court, to the clerk of the Territorial Court, the proper officer in the Yukon Territory to whom such return is required to be made.

Objections were taken on behalf of the sureties that:—

1. No rules were made in the Yukon Territory under the provisions of section 576 of the Criminal Code, and no officer appointed under section 1097 of the said Code:

2. That no notice of estreating the bail was delivered to the sureties:

3. That there was no evidence of the accused nor the bail having been called three times in the Court room and three times without the Court room:

4. That an adjournment was taken of the case from the 27th of April until the 11th of May, which was more than eight days as provided by section 679 of the Criminal Code, and consequently bail could not be enforced and the sureties should be discharged:

5. That no notice was given under the English Crown Rules which are in force in this Territory in the absence of rules in our own Court:

6. That the recognizance was not read over to the sureties and that the evidence of the sureties filed on this application shows that they were not aware that the recognizance was to bind them beyond the 27th day of April, the date to which the charge against the accused had first been adjourned, and consequently the recognizance was entered into by them by a mistake and should not be enforced.

Sections 1097, 1098, 1099 and 1100 of the Criminal Code of Canada provide for the manner in which proceedings may be taken for the estreatment of bail when default is made by a person under recognizance.

It has been the custom in this territory to transmit recognizances to the clerk of the Territorial Court as provided in subsection 2 of section 1099; and section 1104 prescribes that the clerk of the Territorial Court in the Yukon Territory is the proper officer with whom the roll is to be filed.

No rules have been made by this Court as provided by section 576 of the Criminal Code and I am of opinion that no rules are necessary to be made for carrying on such proceedings as the estreatment of recognizances, as they are already provided for by the sections of the Criminal Code above mentioned, and consequently the English Crown Rules do not apply in proceedings such as I am now considering.

In *The Queen v. Creelman*, 25 Nova Scotia Reports, p. 404, the majority of the Court held that the Crown Rules of the province applied to proceedings for estreating recognizances, and that consequently notice to the sureties should be given, as provided by the Rules, before forfeiture of the recognizance, but this case has not been followed by the later authorities. See *Re Frederick Barrett's Bail*, 7 Can. Cr. Cas. 1; *Re Burns' Bail*, 17 Can. Cr. Cas. 292; *Regina v. Schram*, 2 U.C.Q.B., 91; *Re Talbot's Bail*, 23 O.R. 65; also *Re McArthur's Bail*, 3 Can. Cr. Cas. 195,—where it was held that the Crown Rules did not apply and consequently that notice was not necessary before estreating the bail.

As to the question of adjournment for more than eight days. The adjournment was made and the bail furnished to the extended day with the consent and at the request of the accused; and upon the authority of *Re Burns' Bail*, 17 Can. Cr. Cas. 292, and *Regina v. Hazen*, 20 Ont. App. R. 663, it was a matter of procedure and when waived by the defendant, when he consented to an adjournment for more than eight days, the sureties were not discharged. See also the case of *Dick v. The King*, 19 Can. Cr. Cas. 44, where it was held that the delay of eight days which must not be exceeded between two remands upon a preliminary inquiry, does not apply to the case of an accused who is held on bail, and consequently an adjournment for more than eight days is regular where bail is granted.

On the question of calling the accused and the bail three

times within and without the Court room, there is no evidence that the accused was not called three times. The Justice of the Peace who sat on the case says he remembers calling the accused on the 11th of May last, when he sat for the adjourned hearing of the case, but does not remember if he called him three times. This is the only evidence on the point. He says he did not call the bail as he thought that the bail were represented by counsel for the accused.

In Bowen-Rowlands Criminal Proceedings at p. 70, it appears to be the custom in England to call the accused three times within and three times without the Court. If he does not then surrender his bail is called upon in like manner to produce him. It is not stated that the failure to make said calls would release the bail from their contract with the Crown.

In the case before me the bail was for an extended time, and the evidence shews that the bondsmen were not in Court on the said 11th day of May when the case was called, and I am of the opinion that the failure to call upon the bail to produce the accused does not release the sureties.

As to the question of the recognizance not having been read over to the sureties. The evidence of the Justice of the Peace before whom the recognizance was taken is, that before he took the said recognizance he read it down to the place for signatures and where it is signed, and then said to the bondsmen, who came to him to take the recognizance in company with the counsel for the accused, "I don't suppose it is necessary for me to read this over to you as all understand what it is," and one of the sureties answered "No," and that the recognizance was then executed.

Both the sureties McGill and Cronin say the recognizance was not read to them, and that they do not remember that the Justice asked them if they understood the recognizance; but both say that they were not aware that the recognizance was to bind them beyond the 27th day of April, 1914.

Neither of the sureties made any inquiries in regard to the matter, although they knew that the case was adjourned to the

11th day of May from the 27th day of April, and they also knew that the accused Sullivan was at large.

Both McGill and Cronin executed the bond and made no request to have it read to them, although the justice says he asked if they understood it.

In *R. v. Bole*, 9 Can. Cr. Cas. 500, it was held by Boyd, Chancellor, that on a motion to vacate an estreat of bail the Court should not interfere on matters extrinsic to the record, and in which affidavits filed on the motion were conflicting.

The sureties in this case have executed the bond in proper form. They had the opportunity to read it before it was executed, but did not do so. The justice before whom it was executed says they left upon him the impression that they understood what they were doing, and I am of the opinion that there is no such mistake shewn here as in law would release the sureties from the obligation they undertook, and that having executed the bond they must be bound by their own act and are not entitled to be relieved of their obligation on the ground of mistake.

For the above reasons I am of opinion that the Crown is entitled to succeed in the motion now before the Court.

Order for estreat.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE CROSS, J.

REX v. WALKER.

1. COURTS (§ II A—6)—JURISDICTION—CRIMINAL COURTS—STATUS OF POLICE MAGISTRATE—"SESSIONS" COURTS AT MONTREAL.

The court of general sessions of the peace at Montreal, sometimes called the court of quarter sessions, has power to hear and determine all matters relating to the preservation of the peace, and its jurisdiction may be exercised by the other court known as the "Court of the Sessions of the Peace" established by article 3259 R.S. Q.; there is in strictness no "police magistrate's court," the acts of the magistrate are not acts of "a court" although the place of hearing is by Code sec. 714 to be deemed an open court.

2. BAIL AND RECOGNIZANCE (§ I—9)—SURETIES TO KEEP THE PEACE — BREACH OF CONDITION.

The certificate of the magistrate before whom a recognizance to keep the peace had been taken that the condition of such recognizance had been broken is conclusive evidence of breach and forfeiture in the Province of Quebec under Code secs. 1113 and 1114.

3. BAIL AND RECOGNIZANCE (§ I—10)—ESTREAT—SURETIES FOR THE PEACE UNDER JUSTICE'S ORDER.

Where a person under recognizance to keep the peace ordered by a justice under Code sec. 748 (2) on complaint of threats made, is afterwards guilty of a breach of the peace, though towards a person other than the complainant, the recognizance may be forfeited, and the same justice may give the certificate of default after written notice to the defendant and his sureties to shew cause, although the second conviction was before the court of sessions not presided over by the justice who ordered the recognizance.

4. BAIL AND RECOGNIZANCE (§ I—20)—FINDING — SURETIES TO KEEP THE PEACE — THREATS — ENFORCEMENT OF RECOGNIZANCE—PARTIES TO PROCEEDINGS.

Proceedings for the forfeiture and estreat of a recognizance to keep the peace which had been required on proof of threats under subsection (2) of Code sec. 748 may in the province of Quebec, be taken at the instance of another individual than the first complaining party or the party threatened, as the case may be; and this without the intervention of any public authority or Crown officer.

[*R. v. Young*, 4 Can. Cr. Cas. 580, distinguished.]

5. EVIDENCE (§ IV E—412)—JUDGMENT IN CRIMINAL CASE AS EVIDENCE—BREACH OF RECOGNIZANCE.

While the general rule is that a conviction in a criminal case is not proof, in civil proceedings, of the acts upon which the conviction may be grounded, it is still evidence of the particular fact which it recites; and, where it is for an assault, the conviction is admissible as proof on application before another tribunal for forfeiture and estreat of a recognizance there given by the defendant to keep the peace and be of good behaviour.

[*Re Crippen* (1911), 27 Times L.R. 258, referred to.]

6. ESTOPPEL (§ III J—130)—PRIOR INCREASED PUNISHMENT BECAUSE OF BREACH OF RECOGNIZANCE—ENFORCEMENT OF RECOGNIZANCE.

The fact that a court trying a charge of assault doubled the fine which it was about to impose on getting information that the defendant was at the time under recognizance to keep the peace given on complaint of threats to another party unconnected with the subsequent assault, will not bar the estreating of the recognizance; binding to good behaviour is not by way of punishment and the increase in the fine and the subsequent estreat of the recognizance are not two punishments for the same thing.

[*R. v. Rogers*, 7 Mod. 29 applied.]

DECIDED: December 19, 1913.

APPEAL on stated case from the order of a magistrate declaring estreated the appellant's recognizance to keep the peace.

Wilson, K.C., for appellant.

No one for respondent.

MONTREAL: December 19, 1913.

CROSS, J.:—This is an appeal by way of stated case under Code sections 761-769.

It appears in the stated case that the charge against Walker, the appellant, is that he violated the condition of a recognizance to keep the peace into which he had entered before the Police Magistrate; that a trial of that charge was had before the same magistrate, and that an order was made declaring that the appellant had violated the condition of his recognizance by having committed an assault upon one Wassen and directing that the recognizance be extracted from the record and sent to the Superior Court.

It was upon complaint of the respondent Miller that the recognizance had been required by the Police Magistrate to be entered into in the first place. It was upon complaint of another person, namely, Wassen, that the appellant was tried and convicted of assault, and the conviction for assault was made by the Judge of Sessions and not by the Police Magistrate. It is that assault which in this case has been held to have been a breach of the recognizance.

It further appears in the stated case that, having convicted the appellant, the Judge of Sessions had intimated that he would fine the appellant \$5, but that, having been made aware of the existence of the recognizance, he fined the appellant \$10; that is to say, he made the punishment heavier because of the recognizance.

In this state of facts, eight questions are set out in the reserved case. Of these, questions numbers one and two are as follows:—

1. La forfaiture d'un cautionnement de garder la paix pouvait-elle être déclarée par un autre juge que l'honorable juge Bazin qui a entendue la plainte du nommé Frank Wassen contre l'accusé le 6 mars 1913?

2. La Cour de Magistrat de Police de la cité et du district de Montréal présidée par M. Ulric Lafontaine, pouvait-elle entendre d'une plainte portée par le poursuivant Miller contre l'accusé, pour faire déclarer forfait le cautionnement donné par l'accusé le 11 octobre 1912, à raison de la conviction du 6 mars 1913?

It may be opportune, for the sake of clearness, to point out

that, in terms of the law by which Courts are constituted in this province, one of the Courts established is "the Court of the Sessions of the Peace": Art. 3259, R.S.Q.

Another Court is "the Court of General Sessions of the Peace," sometimes called "Court of Quarter Sessions": Arts. 3239 *et* 3240, R.S.Q. The last mentioned Court has power to hear and determine all matters relating to the preservation of the peace, but its jurisdiction may be exercised by the Court of the Sessions of the Peace: Art. 3277, R.S.Q. The last mentioned Court has a clerk who is keeper of its records.

As regards Police Magistrates, it is to be observed that there is no police magistrate's Court. The acts of the magistrate are his acts, but not acts of a Court. He himself keeps minutes of the proceedings had before him. He has the powers of a justice of the peace.

It may be useful to observe that, though section 714 of the Code provides that the room or place in which the justice sits to hear or try a complaint shall be deemed an open and public Court, it does not follow that the acts or sittings of a magistrate or of two or more justices are acts or sittings of a Court.

In the matter now before me, I am brought to consider the effect of the recognizance as an act entered into before a justice of the peace, in relation to the mode of procedure to be adopted for an estreat, and the judicial functionary competent to order an estreat.

The authority of the Police Magistrate to order and take this recognizance is declared in clause 2 of section 748 of the Code.

Now, as regards the power to order forfeiture and estreat, it can readily be understood that there may be a difference between a bond to appear and a bond to keep the peace, arising from the difference in the kinds of obligation.

When the default consists in a default to appear at an indicated time and place, it is made clear in section 1097 that "the justice who took the recognizance, or any justice who is there present," is the authority competent to certify to the breach, but it is argued for the appellant that that provision does not apply to articles of the peace.

It is true that the rule of section 1097 applies only to recognizances to appear and to recognizances to prosecute an appeal upon stated case, but farther on we have section 1100, which reads:—

1100. All recognizances taken or entered into under any provision of this Act, which are forfeited or in respect to which the conditions of such recognizances, or any of them, have not been complied with, shall be liable to be estreated in the same manner as any forfeited recognizance to appear is by law liable to be estreated by the Court before which the principal party thereto was bound to appear.

We have consequently to see how estreat is operated in the case of a recognizance to appear. That brings us first to section 1113 wherein it is provided that, in the Province of Quebec, whenever default has been made in the condition of any recognizance lawfully entered into in any criminal matter, the recognizance shall be estreated or withdrawn from the record, and in the next place to section 1114 which reads as follows:—

1114. Such recognizance, certificate or minute as the case may be shall be transmitted by the Court, recorder, justice, magistrate, or other functionary before whom the cognizor . . . was bound to appear, or to do that by his default to do which the condition of the recognizance is broken, to the Superior Court in the district in which the place where such default was made is included for civil purposes, with the certificate of the Court, recorder, justice . . . as aforesaid, of the breach of the condition of such recognizance, of which, and of the forfeiture to the Crown of the penal sum therein mentioned, such certificate shall be conclusive evidence.

I consider that it results from these provisions that the certificate of the magistrate before whom the cognizor was bound is conclusive evidence of breach and forfeiture.

I find that the Police Magistrate who took the recognizance was not required, by any enactment operative in the Province of Quebec, to transmit the instrument to the Court of the Sessions of the Peace, and I consider that the circumstance that the cognizor was tried for the assault on Wassen did not of itself clothe the Court of the Sessions with authority to certify the breach, though the result of that trial might have afforded the Court of the Sessions a ground upon which on public grounds, it could have ordered the giving of new recognizances. Harris Criminal Law, 10th ed., 297.

The first question is, therefore, to be answered in the affirma-

tive, and, from what has been said, it will be seen to follow that an application to have a breach of the condition certified could appropriately be made to Mr. Lafontaine, the Police Magistrate. In the matter here in question, that application was made by way of complaint, alleging the breach, and summons. That was a suitable mode of procedure though possibly not in strictness necessary.

Thus, in the case of recognizances after conviction to come up for judgment and in the meanwhile to keep the peace, there is a practice to proceed upon a written notice to the defendant and to the sureties. Bowen-Rowlands, Criminal Proc., 2nd ed., 277.

In relation to the nature of articles of this peace and the jurisdiction of justices in respect of them, it may be useful to quote the following summary from the Encyclopedia of the Laws of England, title "Articles of the Peace," 2nd ed., p. 523:—

The procedure is of a special or exceptional character, being what has been termed a branch of preventive justice (4 Black, Com. c. 18) in the nature of a *quia timet* suit in a criminal case, to obtain security against future breaches of the peace.

Jurisdiction of justices of the peace, to require sureties to keep the peace rests upon immemorial usage, as established by judicial decisions (see *R. v. Justices of Queen's County* (1882), 10 L.R. Ir. 294, 301). Its origin is variously assigned to (1) the powers inherited from conservators of the peace; (2) the statutes 34 Edw. III., C. I. and 3 Hen. VII., C. 2; and (3) the commission of the peace, which may perhaps be read as a contemporary or traditional exposition of the Act of Edw. III.

The case of *R. v. Trueman*, 29 Times L.R. 599, may also be referred to, again, as indicating what is referred to as the "former practice" it is said in Archbold Cr. Pleading and Evid., 23rd ed., at p. 117: "The Court of Exchequer had jurisdiction over recognizances forfeited before justices of the peace in or out of sessions."

In ampler terms it is said in Burn's Justice, vol. 5, p. 8, that by 3 Henry VII., ch. 1:—

The justices shall certify their recognizances for keeping the peace to the next sessions, that the party may be called; and if he make default the default shall be recorded and this recognizance, with the record of the default, shall be sent and certified into the Chancery, King's Bench or Exchequer.

Afterwards, by virtue of 42-43 Vict., ch. 49, sec. 9, Courts of

summary jurisdiction were empowered to forfeit recognizances conditioned to appear or do other matters in proceedings before them, instead of certifying the recognizances to Quarter Sessions for enforcement as was the old practice under 3 Henry VII. ch. 2, and 16-17 Vict. ch. 30, sec. 2, but, at the date at which *R. v. JJ. of West Riding*, 7 A. & E. 583, cited in Paley (note at p. 348), and referred to at the hearing, was decided, it appeared that the enactment providing for transmission of recognizances to the Quarter Sessions did not apply to articles of the peace, and it was decided that, as regards these, the old procedure of *scire facias* should be resorted to.

That was corrected by the summary jurisdiction Act, 1879 (42-43 Vict. ch. 49), and thereafter in England a recognizance to keep the peace could be declared by the Court before whom it was entered into to be forfeited, upon proof of the conviction of the person bound as principal of any offence which is in law a breach of the condition of the recognizance.

Counsel for the appellant say that this enactment did not extend to this Dominion or colonies and that the learned magistrate erred in having referred to it as authority, but that point ceases to be of importance when it is seen, as I think is above demonstrated, that our Criminal Code in the sections above cited, establishes the same result and effect.

It may also be opportune to add that the wording of art. 3351, R.S.Q., is such as to imply that the old common law powers of justices of the peace are preserved, and are to be taken as conferred upon them by the fact of their appointment, and to point out, in so far as the provincial power to constitute Courts may be considered to be in question, that articles 3394 and 3395, R.S.Q., reproduce section 1113 and 1114 of the Criminal Code or perhaps, I should say, have the same wording.

I think that what has been said suffices to enable the proper answers to be given to question number 2 and that it should be said, in answer to that question, that the Police Magistrate could hear Miller's application for forfeiture and estreat, in view of the conviction for assault in the Court of the Sessions and notwithstanding the trial and conviction had in that Court.

Questions numbers 3 and 4 raise the contention that Miller

had no standing to prosecute the forfeiture and estreat, and that that could be accompanied only at the instance of the Crown (Ministère Public). The effect of what I have said is to place the matter upon the same footing as other proceedings before a magistrate. As in other matters of criminal and penal practice under our English law system, so in a matter such as that here in question it is left to the individual person cognizant of the facts to set the machinery of the Courts in motion. There are special cases in which it is required by statute that proceedings should be commenced by some specified officer or upon leave obtained, but I find no such requirement in this matter.

Questions numbers 3 and 4 are, therefore, to be answered, the former in the negative and the latter in the affirmative, by saying that the intervention of the public authority was not necessary in proceedings for forfeiture and estreat, and that such proceedings could be had on application of Miller.

The case of *R. v. Young*, 4 Can. Cr. Cas. 580, was relied upon for the appellant, but in that case the recognizance had been taken after trial and verdict upon indictment. It is clear that different considerations would enter into the matter in such a case.

A more difficult question is raised in number 5, which is as follows:—

Cette cour (the police magistrate) ainsi présidée pouvait-elle, sur une simple production de conviction, déclarer forfait le cautionnement fourni par l'accusé?

Otherwise stated, the question is, did production of the conviction for assault accompanied by proof of the recognizance and of identity of the defendant, constitute proof of a breach of the peace by the defendant?

The purport of the Imperial Act of 1879 would make it suffice as proof in England, but our Code or statute law does not in terms so enact, and the general rule is that a conviction in a criminal or penal case is not proof, in another case, of the acts upon which the conviction may be grounded. Neither is a conviction of one person evidence against another person on another charge grounded on the same facts: *Taylor v. Wilson*, 28 Times L.R. 97.

The reason generally assigned for that rule is that the principle of *res judicata* applies only between the same parties, and that the parties to a criminal proceeding and the parties to a civil action arising out of the offence are not the same. In the matter here in question, that ground of distinction cannot apply. The parties in the assault case were The King against Walker and these were also the parties in the proceedings for forfeiture and estreat, whatever names may happen to have been put into the papers as names of prosecutors. It is clear that in neither case was any private satisfaction or adjudication sought or awarded to the person who for convenience is called the "complainant."

But I consider that it may further be said that, though a conviction does not make proof in another action of the doing of the acts on which it is grounded, it is still evidence of the particular fact which it recites, and that proof of the conviction for assault does amount to proof of a breach of the peace and consequently of a violation of the condition of the recognizance. Reference may be made to Brown's Maxims, 341, and to the reasoning in *Re Crippen* (1911), 27 Times L.R. 258.

I, therefore, conclude that question number 5 is to be answered in the affirmative.

In question number 6 it is asked whether the Police Magistrate—I take it that that is to be held to be what is meant, though the expression "*la présente Court*" is made use of—could take cognizance of the proceeding for forfeiture, seeing that the Court of the Sessions had refrained from certifying the breach and ordering estreat.

In view of what has been already said, it is to be answered that the Police Magistrate was an authority competent to certify to the breach and order estreat, and that the Court of the Sessions was not shewn to have been seized of any proceeding to that end.

The remaining questions (numbers 7 and 8) relate to the circumstance that the Judge of Sessions was about to impose a fine of \$5 upon the appellant, but that, upon being made aware of the recognizance, changed his mind and imposed a fine of \$10.

In these circumstances, it is argued that the appellant, by the order of forfeiture and estreat, has been punished a second time for the same matter, and can plead *autrefois convict*. The question, in reality amounts to a question of fact. The appellant was fined \$10 for having broken the peace. His breach of the peace was of a more serious character because of the outstanding recognizance. But for the recognizance, the fine would have been \$5 only.

It is to be observed that the fine of \$10 was imposed for commission of a specified offence. The recognizance had been ordered as a measure of preventive justice in the exercise of this power of the magistrate as a conservator of the peace.

It happens that the assault on Wasson, besides being a punishable offence, constituted a breach of the recognizance. The same act may sometimes constitute two or more penal offences. Here it constitutes an offence and is evidence of breach of a bond. The increase in the amount of the fine imposed in the Court of Sessions and the subsequent forfeiture and estreat of a recognizance are not two punishments for the same thing. It was said by Holt, C.J., in *R. v. Rogers* (1702), 7 Mod. 29, quoted in Archbold, Quarter Sessions, 6th ed., p. 222, that

binding to good behaviour is not by way of punishment, but it is to shew that when one has broke the good behaviour he is not to be any more trusted.

Questions 7 and 8 are formulated upon the assumption of a second punishment for the same offence. They are not in accord with the facts as recited by the magistrate in the statement of case, and consequently need not be further answered.

The certificate of forfeiture and order of estreat are consequently affirmed with costs and the appeal is dismissed.

Appeal dismissed.

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE ELWOOD, J., IN CHAMBERS.

REX v. PROKOPATE.**1. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL—ASSAULT OCCASIONING BODILY HARM—TRIAL WITHOUT CONSENT IN SASKATCHEWAN.**

A charge under Code sec. 295, of assault causing actual bodily harm may be summarily tried in Saskatchewan by two justices under sec. 776 without the consent of the accused under sec. 778.

[*R. v. Hostetter*, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363, *R. v. Zyla*, 17 W.L.R. 258, applied.]

2. APPEAL (§ III F—97)—FROM SUMMARY CONVICTION—TEN DAYS LIMITATION—SHEWING CORRECT DATE OF CONVICTION.

Where there is any question as to the correct date of a summary conviction it is open for the appellant to shew that date by extrinsic evidence and support his appeal taken within 10 days therefrom as in time, although the conviction itself bears a prior date which would make it appear that the notice of appeal was late. (*Dictum per Elwood, J.*).

DECIDED: March 5, 1914.

APPLICATION for a writ of *habeas corpus* and for an order that a writ of certiorari do issue in aid of such writ. A number of grounds were urged for issuing the writ, among them:—

(a) That the accused was convicted under sec. 295 of the Criminal Code of having assaulted Kost Martinuik (the respondent on this appeal) by striking him on the head with an iron bolt, causing actual bodily harm, and that the accused did not consent to be tried summarily by the justices on the charge, and that the justices had no jurisdiction without such consent to hear the charge.

(b) That the accused was not tried nor convicted at the time set out in the conviction, and that the said conviction by reason of its being ante-dated by the said justices deprived the applicant of his right to appeal therefrom.

(c) That the said justices did not state to the accused as required by sec. 778 of the Criminal Code that he had the option to be tried forthwith by the magistrate without the intervention of a jury or to remain in custody or under bail to be tried in the ordinary way by a Court having criminal jurisdiction.

And in the alternative, the said justices did not reduce the charge to writing and read the same over to the accused.

(d) That if the charge dealt with by the said justices was one of the common assault, then the accused having been tried summarily, the punishment was excessive.

H. Ward, for the accused.

H. E. Sampson, for the Crown.

ELWOOD, J.:—Following the judgments of Wetmore, C.J., in *R. v. Hostetter*, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363; *R. v. Zyla*, 17 W.L.R. 258; the judgment (unreported) of Haultain, C.J., in *Rex v. Morton*, and the judgment (unreported) of Newlands, J., in *R. v. Zachman*, I am of the opinion that the magistrates had jurisdiction to try the accused without his consent.

This, therefore, disposes of objections (a), (c), and (d).

So far as objection (b) is concerned, the conviction was apparently dated on the 12th of the month, whereas it actually took place on the 28th of the month. Apparently an appeal was taken, and the district Court Judge before whom the appeal was taken refused to hear the appeal on the ground that the notice of appeal was not served within ten days of the date of the conviction, he apparently being of the opinion that the conviction was on the 12th of the month instead of the 28th. I take it from remarks that were let fall before me that there was oral testimony given as to the date of the conviction, and apparently the oral testimony shewed that the conviction took place on the 12th of the month. However, it was quite open to the parties to shew the district Court Judge the date of the conviction. He was not bound by the date mentioned in the conviction, but if proper testimony had been brought before him to shew the date that the conviction did take place he, in my opinion, should have entertained the appeal, if the notice of appeal was served within ten days from the date upon which the conviction actually took place.

The result will be that the application will be dismissed.

The only person who appeared on this application outside of the applicant was the representative of the Attorney-General, and there will be no order for costs against the applicant.

Motion dismissed.

[SUPREME COURT OF ALBERTA.]

JUDICIAL DISTRICT OF CALGARY.

BEFORE HARVEY, C.J., STUART, AND SIMMONS, JJ.

REX v. BOARDMAN.**1. CRIMINAL LAW (§ IV A--104)—RECORD—PUNISHMENT BY WHIPPING — STATUTORY DIRECTIONS FOR MEDICAL SUPERVISION.**

Failure to set out, in the record of a conviction on summary trial under which the punishment of whipping was ordered, that the whipping should take place under the supervision of a medical officer in the terms of Code sec. 1060 will not invalidate the sentence; the directions of Code sec. 1060 cannot be varied by the magistrate and, even if they should be formally stated in the record (as to which, *quere*) the omission is an informality only and does not affect the validity of the conviction.

2. CRIMINAL LAW (§ IV A—90)—SENTENCE—IMPRISONMENT AND WHIPPING —ILLEGALITY OF DIRECTION AS TO TIME OF WHIPPING.

The fixing of the time or times for punishment by whipping ordered to take place during the convict's term of imprisonment is left by Cr. Code sec. 1060 in the discretion of the prison surgeon under whose supervision the whipping is to be done; and it is an excess of jurisdiction on the part of a magistrate holding a summary trial to order in the sentence that ten lashes be imposed six weeks after imprisonment and ten lashes six weeks before expiration of the term of six months imprisonment imposed; but the Court hearing a *habeas corpus* application may amend the conviction under Cr. Code sec. 1124 by imposing the proper sentence where satisfied of the offence.

3. APPEAL (§ VIII B—870)—CRIMINAL CASE—RENDERING MODIFIED JUDGMENT—SENTENCE OF WHIPPING.

Where a sentence of whipping imposed on a summary trial was successfully attacked as having improperly included a direction as to the times when the whipping should take place, which by statute was under the control of the prison surgeon and not of the magistrate, and pending such determination in a *habeas corpus* application the Court had stayed proceedings in respect thereof, the Court has a discretion to strike out the sentence of whipping and confirm the sentence of imprisonment if the latter is so near expiry that it would be impossible to carry out the evident intention of the convicting magistrate that the first half of the whipping should be given at a considerable interval from the second half.

DECIDED: June 30, 1914.

MOTION for *habeas corpus* and a certiorari in aid.

The conviction was amended.

James Short, K.C., for the Crown.

F. E. Eaton, for the accused.

The judgment of the Court was delivered by

HARVEY, C.J.:—The accused was convicted by Gilbert E. Saunders, Esquire, Police Magistrate for the City of Calgary, of robbery with violence and sentenced to six months' imprisonment with hard labour and to receive 20 lashes, 10 lashes six weeks after imprisonment, and 10 lashes six weeks before expiration of term.

This is an application for *habeas corpus* and certiorari in aid made to my brother Walsh and by him referred to the Appellate Division. Several objections were taken, but the only one which calls for consideration is the one that relates to the provision respecting whipping.

Section 1060 which states the provisions regarding whipping is as follows:—

1060.—Whenever whipping may be awarded for any offence, the Court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison, under the supervision of the medical officer of the prison, or if there be no such officer, or if the medical officer be for any reason unable to be present, then, under the supervision of a surgeon or physician to be named by the Minister of Justice, in the case of prisons under the control of the Dominion, and in the case of other prisons by the Attorney-General of the province in which such prison is situated.

(2) The number of strokes shall be specified in the sentence; and the instrument to be used for whipping shall be a cat-o'-nine tails unless some other instrument is specified in the sentence.

(3) Whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence.

(4) Whipping shall not be inflicted on any female.

It is contended that the sentence and the record of conviction must contain all the directions of the first sub-section of the section, and that this conviction is bad in not doing so. Then it is contended that the sentence and conviction are bad in fixing the time, as no authority is given to do more than fix the number of strokes and the number of times.

Under section 1124 authority is given in an application such as this to disregard any irregularity or informality if the depositions shew that the offence has been committed. A perusal of the depositions satisfies us that the offence was committed.

We are also of opinion that even if the section did require all

but the first two lines to be set out in the conviction, as to which there is room for argument, the failure to so set it out would be only an informality because it contains nothing as to which the magistrate has any discretion. It simply sets out the law and cannot be varied. It is, therefore, unnecessary to determine whether it is intended that it should be part of the sentence, and record of conviction or not, since no effect should be given to its omission even if required.

On the second point we are, however, of opinion that the objection is well founded. No authority is given to fix the time or times of the whipping. It is to be done under the supervision of the surgeon, and a certain restriction is imposed by sub-section three. The fixing of the time or times is, in our opinion, an interference with the discretion which is given to the gaol surgeon, which is unauthorized, and which perhaps could not with safety to the health of the convict be carried out. In this respect we think the sentence is in excess of the magistrate's jurisdiction.

Section 1124 also provides that this shall not affect the conviction, but only the punishment, and places on this Court the duty of imposing a sentence which is authorized, as was done in *Rex v. Crawford* (1912), 20 Can. Cr. Cas. 49, 5 A.L.R. 204, 6 D.L.R. 380.

We would not think of venturing to criticize the sentence of the Police Magistrate in this case. The Police Magistrate of any important city has so much more experience in dealing with this sort of case than any Judge can have that if he is a man of sound sense and discretion his judgment of what is a proper sentence ought not to be lightly interfered with. Then when that Magistrate has had the experience with crime as a police officer and jailer that Mr. Saunders has, his opinion is entitled to even greater weight.

His intention in the present case was that the whipping should be divided into two portions with a considerable interval between. The term of imprisonment has now been two-thirds passed, and has only about two more months to run, if it is not shortened by executive clemency.

It is apparent, therefore, that there is no possibility of carrying out his intention in this respect, the execution of the sen-

tence as to whipping having been stayed by my brother Walsh pending the determination of this application.

In view of that fact and of the short time yet to be served, we are of opinion that the portion of the sentence which prescribes whipping may well be struck out and the sentence confirmed in other respects, and the necessary amendments will be deemed to be made to the conviction and warrant of commitment.

Conviction amended.

[SUPREME COURT OF CANADA.]

BEFORE IDINGTON, DUFF, ANGLIN AND BRODEUR, JJ.

MULVIHILL v. THE KING.

1. APPEAL (§ VII E—320)—CRIMINAL APPEAL—QUESTIONS OF LAW—REFUSAL TO POSTPONE TRIAL.

Where the Court on an application under Cr. Code section 901 has, in the exercise of judicial discretion, refused to allow a postponement of a criminal trial, there can be no review of the decision by an appellate Court and the question presented does not constitute a question of law upon which there may be a reserved case under the provisions of section 1014 of the Criminal Code.

[*R. v. Charlesworth*, 1 B. & S. 460; *Winsor v. The Queen*, L.R. 1 Q.B. 390; *Rex v. Lewis*, 78 L.J.K.B. 722; *Rex v. Blythe*, 15 Can. Cr. Cas. 177. 19 O.L.R. 386; *Reg. v. Johnson*, 2 C. & K. 354; and *Reg. v. Slavin*, 17 U.C.C.P. 205, referred to; *R. v. Mulvihill*, 22 Can. Cr. Cas. 354, affirmed; and see Annotation on Postponment of Criminal Trials at end of this case.]

2. APPEAL (§ III F—98)—EXTENSION OF TIME—OBJECTION THAT APPEAL NOT COMPETENT—CRIMINAL APPEAL—CR. CODE (1906), SEC. 1024.

On a motion to extend the time for appealing under Cr. Code 1024 from the affirmance of a conviction for an indictable offence from a provincial appellate Court to the Supreme Court of Canada, the latter Court will enter upon the question of the competency of the appeal and if of opinion that the question is not appealable will refuse the extension.

ARGUED: March 23, 1914.

DECIDED: March 25, 1914.

APPLICATION, on behalf of the appellant, for extension of the time for giving notice, as required by section 1024 of the Criminal Code, of an appeal from the judgment of the Court of Ap-

peal for British Columbia, *R. v. Mulvihill*, 22 Can. Cr. Cas. 354, 26 W.L.R. 955, whereby the conviction of the appellant upon an indictment for murder was sustained, McPhillips, J., dissenting.

Coté, in support of the application.

J. A. Ritchie, contra.

INDINGTON, J.:—Unless we are prepared to declare that it is arguable that it may be held to be law that a prisoner has a legal right to insist upon postponement of his trial in any case where some evidence to be adduced against him has been brought to the notice of his counsel for the first time on the day of the trial, this motion must be refused.

The proposed appeal here is based upon the dissenting opinion of Mr. Justice McPhillips, which in turn rests upon facts which imply nothing more than I have stated. A good many more facts are set forth therein, but none adding anything to the strength of the alleged legal right, or interfering in any way with the discretion assigned the learned trial Judge in such case.

It would not be in the interests of the administration of justice to grant an indulgence such as now asked to permit of the presentation of such a case.

It may, in some cases where like indulgence may be asked, not be so easy as here to grasp all that really is involved in the proposed appeal.

The motion must be refused.

DUFF, J.:—After full consideration of the circumstances I think the application ought not to be granted. The question which counsel for the accused desires to raise upon appeal to this Court is the question whether the accused was entitled to a traverse of the trial in the circumstances mentioned in the reserved case. My opinion is that, in this respect, the case does not present a question of law within section 1014 of the Criminal Code. I have reached this conclusion after the most anxious consideration of the judgment given in the Court below in which

the considerations in favour of the view that a question of law is stated are set forth with great fullness and ability. I can only say that, having come to a very clear conclusion that the appellant's appeal on this point would be hopeless, and that being of the opinion of my learned brothers, I think no possible object could be served by granting the application.

The right to invoke the jurisdiction of the Courts by way of appeal from a conviction after a trial at the assizes given by section 1014 of the Criminal Code is a strictly limited one. The Code does not contemplate that an accused person should be entitled as of right to claim redress by way of appeal in every case in which it alleged that the trial Judge has made a mistake as, for instance, in respect of a question which is left to his discretion; the appeal given is by way of case stated and the case must present some question of law. In respect of cases not falling within section 1014 or section 1021 a right is given by section 1022 to apply to the Minister of Justice who has power to order a new trial.

ANGLIN, J.:—The defendant applies to extend the time for service of notice of appeal to this Court under section 1024 of the Criminal Code. The judgment of the Court of Appeal for British Columbia affirming his conviction for murder was pronounced on the 27th of January, 1914. He had the right to give notice of appeal within the fifteen days thereafter which section 1024 allows. But, having permitted that time to expire without giving notice, he now asks indulgence on the ground that he had not until quite recently the means to launch or prosecute the appeal which he desires to take. Before granting an extension of time to serve the notice it is our duty to satisfy ourselves that the proposed appeal involves a question of law which could be reserved under section 1014 of the Code and would properly form the subject of an appeal to this Court.

The learned trial Judge reserved three questions for the opinion of the Court of Appeal:—

(1) Whether the prisoner was entitled to a traverse of the trial to the Spring Assizes.

(2) Whether the trial Judge was right in permitting counsel for the Crown to ask the accused when he was giving evidence on his own behalf if he had been charged with or had committed certain offences.

(3) Whether the trial Judge was right in permitting the accused to be cross-examined on his alleged testimony at the inquest in the absence of the original depositions.

The Court of Appeal unanimously answered the second and third questions in the affirmative; and it has been decided in *McIntosh v. The Queen*, 23 Can. S.C.R. 180, 5 Can. Cr. Cas. 254, that the right of appeal to this Court is confined to questions upon which there has been dissent in the provincial Court of Appeal. The defendant's right of appeal is, therefore, restricted to the first question. Three of the five Judges of the provincial Court of Appeal held that this was not a question of law which might be reserved under section 1014, and four of them that, if it were, it should be answered in the negative. Mr. Justice McPhillips dissented from the opinion of the majority on both grounds.

Section 901 of the Criminal Code declares that "no person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any Court." By sub-section 2, power is conferred on every trial Court, in its discretion, to grant an adjournment of trial to any prisoner.

The grand jury indicted the defendant on the 13th of October, 1913. On that day he was assigned counsel, who was informed that the Crown proposed to call two witnesses whose names were on the indictment, but who had not given evidence at the preliminary investigation. A copy of the memorandum purporting to state the substance of the testimony which these witnesses were expected to give was also furnished him. There is no doubt that this evidence was of vital importance and disclosed facts not stated at the preliminary investigation. Counsel for the prisoner moved to traverse the trial in order to have an opportunity to "inquire into the antecedents (of these witnesses) and the reason their evidence had not been given at the

preliminary investigation and was being now given," and on other general grounds. The Crown opposed postponement because of the expense involved and the great danger of loss of material evidence. The Court offered to transfer the case to the Vernon Assizes to be held a fortnight later. Counsel for the defence declined to accept this offer, saying it would be useless to him, and the trial proceeded, on the 16th October, resulting in the defendant being convicted of murder.

While it is possible to conceive of cases in which it would be clear that there had not been any exercise of judicial discretion in granting or refusing postponement of trial, and in such cases there might be error of law which would be properly reviewable, where, in what was clearly an exercise of his discretion, the trial Judge has refused a postponement because he was "of the opinion" that further time should not be allowed (sec. 901, sub-sec. 2 (Crim. Code)), I am satisfied that the propriety of that exercise of discretion is not reviewable by an Appellate Court and is not properly the subject of a reserved case under section 1014. The principle which underlies the decisions in *The Queen v. Charlesworth*, 1 B. & S. 460, and *Winsor v. The Queen*, L.R. 1 Q.B. 289, 390, approved in *Rex v. Lewis*, 78 L.J.K.B. 722, applies. I am, with respect, unable to appreciate the distinction which it is suggested exists between the discretion conferred where "the matter rests in the opinion of the Court," 26 W.L.R. 955, at pp. 964-5, and this case where the Court is empowered to postpone, if it "is of the opinion" that it should do so.

If the propriety of the refusal of the postponement is a question of law (*Rex v. Blythe*, 19 O.L.R. 386, pp. 389, 392), reviewable under section 1014 *et seq.* of the Criminal Code, I agree with Martin, J.A., and Irving, J.A., that, under the circumstances of the present case, interference by an appellate Court would be out of the question: *Reg. v. Johnson*, 2 C. & K. 354; *Reg. v. Slavin*, 17 U.C.C.P. 205, at p. 211.

I am, for these reasons, of the opinion that the extension of time asked for must be refused.

BRODEUR, J.:—By the provisions of article 1024 of the Criminal Code there is an appeal to this Court by any person convicted of any indictable offence if the Court of Appeal has not been unanimous. But notice of appeal should be served on the Attorney-General within fifteen days after the judgment appealed from has been rendered. However, this Court or a Judge thereof may extend the time within which the notice of appeal should be given. The object of the present application is to obtain that extension.

The applicant has been convicted of murder in the month of October last. He was, by the sentence of the Court, to be executed on the 29th of December last. On the 23rd of December, just a few days before the date fixed for the execution, his counsel applied for a reserved case and a reprieve was granted until the 30th day of January. The Court of Appeal rendered its judgment on the 27th of January last. The execution of sentence was postponed until the 4th of April, 1914.

Instead of giving notice of appeal to this Court, as required by law, the applicant waited until the 17th of March to apply for an order extending the time for serving upon the Attorney-General of the province the notice of appeal. I have gone into the merits of the case in order to satisfy myself as to whether the case presented some serious doubts, and I failed to see any good reason why we should grant the delay asked for.

The only point of importance which was reserved by the trial Judge and about which there was a dissenting opinion in the Court of Appeal was whether the trial Judge had exercised a proper discretion in refusing to postpone the trial to the Spring Assizes.

It was not established that the ends of justice would have been served by postponing the trial to the Spring Assizes. On the contrary, it was to be feared that the witnesses could not be procured at the future time at which it was prayed to put off the trial.

The witnesses about whom the prisoner wanted to have some information were well known to him, had been in relation with him for some time, and he knew of the antecedents of those witnesses.

It has been stated in *Rex v. Jones*, in 1806, 8 East 31, at p. 34, that it is the constant practice of the Old Bailey not to put off trials for the absence of witnesses to character only.

For these reasons the present application now made to this Court should be dismissed.

Application refused.

**Annotation—Continuance and Adjournment (§ II—8)—Criminal Law—
Postponement of trial—Cr. Code (1906) sec. 901.**

Archbold (Criminal Pleading, 22nd ed., 110) says:—

"Indictments for felonies are tried at the same assizes or sessions at which they are preferred to and found by the grand jury. They may, however, be postponed to the next assizes or sessions at the instance of the prosecutor or the defendant on shewing to the Court a sufficient cause for the delay, such as the unavoidable absence or illness of a necessary and material witness, the existence of a prejudice in the jury, and the like."

A Superior Court will not on the application of the accused order a magistrate holding a preliminary enquiry to forthwith commit for trial, although a *prima facie* case is admitted by the accused and committals had been made by the same magistrate of others charged with the same offence on similar evidence. A Superior Court will not interfere with the magistrate's discretion as to adjourning the enquiry when the discretion is exercised in good faith and he must be allowed a reasonable time after the close of the evidence to reach a decision: *Re Ying Foy*, 15 Can. Cr. Cas. 14, 14 B.C.R. 254.

Section 901 of the Criminal Code (1906) provides that no person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any Court, or to imparl, or to have time allowed him to plead or demur to any such indictment.

If the Court before which any person is so indicted, upon the application of such person or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to prepare for his defence, or otherwise, such Court may grant such further time and may adjourn the trial of such person to a future time in the sittings of the Court, or to the next or any subsequent session or sittings of the Court, and upon such terms, as to bail or otherwise, as to the Court seem meet, and may, in the case of adjournment to another session or sittings, respite the recognizances of the prosecutor and witnesses accordingly: Sec. 901 (2).

In such case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session or sittings without entering into any fresh recognizances for that purpose: sec. 901 (3).

An application to postpone a trial by jury in consequence of the absence of material witnesses must be supported by special affidavit shewing that the witnesses are material: *R. v. Dougall* (1874), 18 L.C. Jur. 85.

It is no ground of "surprise" that the prisoner had no knowledge of the evidence to be produced against him, for no one is obliged, by pleading, or otherwise, to disclose the evidence by which his case is to be supported. It is sufficient that the party is fully apprised of the case or charge which

Annotation (continued)—Continuance and Adjournment (§ II—8)—Criminal Law—Postponement of trial—Cr. Code (1906) sec. 901.

it is proposed to prove against him; and he must then, being so informed, prepare himself to repel it: *R. v. Slavin* (1866), 17 U.C.C.P. 205.

On an application by the Crown to postpone a criminal trial because of the absence of Crown witnesses, the Court may accept the statement of the Crown counsel that reasonable efforts were made to procure their attendance without requiring proof upon oath. The accused is not entitled to detailed information as to the efforts made to procure their attendance: *McCraw v. The King*, 13 Can. Cr. Cas. 337.

Although the Crown elects to proceed with a criminal trial in the absence of a material witness, and although the trial has commenced, the Court has power to grant an adjournment to enable the Crown to get the witness: *R. v. Gordon*, 2 Can. Cr. Cas. 141, 6 B.C.R. 160. But an adjournment of a speedy trial was refused as contrary to the spirit of the Speedy Trials Act, where it was sought by the Crown for the purpose of getting better evidence that a witness examined on the preliminary enquiry was absent from Canada and that in consequence his deposition then taken might be read: *R. v. Morgan*, 2 B.C.R. 329.

An order made on the opening day of the sittings of the Criminal Court and before a true bill had been found against the accused that the trial should be postponed at the request of the prosecution in the event of an indictment being found, was supported in an English case: *R. v. Doran* (1914), 10 Cr. App. R. 67; but bail should be offered if the offence is bailable. *Ibid.* And in case of an epidemic preventing the attendance of the witnesses before the grand jury, Baggalley, L.J., postponed a trial without requiring the bill to be sent up before the grand jury at that session, but the prisoner was admitted to bail until the next assize: *R. v. Taylor* (1882), 15 Cox C.C. 8. But, in general, a trial will not be postponed to the next assizes before a bill is found: *R. v. Heesom*, 14 Cox C.C. 40.

Where it appears by affidavit that a necessary witness for the prisoner is ill, or that a witness for the prosecution is ill, or unavoidably absent, or is kept out of the way by the contrivance or at the instigation of the prisoner, the Court will postpone the trial, unless it appear that the requirements of justice can be satisfied by reading the witness's depositions before a magistrate: Roscoe Cr. Evidence, 11th ed., 185.

If the application is made on the ground of the absence of a material witness, the Judge will require an affidavit stating the points which the witness is expected to prove, in order to form a judgment whether the witness is a material one or not: *R. v. Savage*, 1 C. & K. 75.

Where a prisoner's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for the prosecution, who had been bound over to appear at the assizes, was absent, and that on cross-examination this witness could give material evidence for the prisoner, Cresswell, J., after consulting Patteson, J., held that this was a sufficient ground for postponing the trial, without shewing that the prisoner had at all endeavoured to procure the witness's attendance, as the prisoner might reasonably expect, from the witness having been bound over, that he would appear: *R. v. MacCarthy*, Carr. & M. 625.

In *R. v. Palmer*, 6 C. & P. 652, the Judges of the Central Criminal Court

Annotation (continued)—Continuance and Adjournment (§ II—8)—Criminal Law—Postponement of trial—Cr. Code (1906) sec. 901.

postponed until the next session the presentment of a bill for a capital offence to the grand jury, upon the affidavit of the attorney for the prosecution, that a witness, whose evidence was sworn to be material, was too ill to attend, and they refused to refer to the deposition of the witness to ascertain whether he deposed to material facts.

A trial for murder was postponed till the next assizes by Channell, B., upon an affidavit of a medical man as to a witness being unable to travel, although such witness was not examined before the magistrate, and although the trial had been fixed for a particular day: *R. v. Lawrence* (1866), 4 F. & F. 901.

In *R. v. Johnson* (1847), 2 C. & R. 354, Alderson, B. refused to postpone the trial of a prisoner charged with murder, where the postponement was sought to give an opportunity of investigating the evidence and characters of certain witnesses for the prosecution who had not been examined before the committing magistrate, but who were to be called to prove previous attempts by the prisoner on the life of the deceased.

It is now recognized as a rule of practice that a trial will not be put off on account of the absence of witnesses to character: *R. v. Jones* (1806), 8 East 34.

Where the prisoner applies to postpone the trial, he will be remanded and detained in custody till the next assizes or sessions, or will be admitted to bail, but he is never required to pay the costs of the prosecutor: *R. v. Hunter*, 3 C. & P. 591.

Where the application is by the prosecutor, the Court in its discretion will either detain the prisoner in custody, or admit him to bail, or discharge him on his own recognizances: *R. v. Beardmore* (1836), 7 C. & P. 497; *R. v. Parish* (1837); id. 782; *R. v. Osborne* (1837), id. 799; see also *R. v. Crowe*, 4 C. & P. 251.

Before any application can be made to postpone the trial, notice should be given to the opposite party, in order that he may attend and oppose it. Upon this an affidavit must be made, stating the names and places of abode of the absent witnesses, and that they are material to the prosecution or defence. Affidavits in corroboration may be filed. It is, in general, necessary, in the affidavit of the absence of a material witness, to state at what time his return may be expected; but this may be, in some cases, dispensed with; as if he is on board a ship in His Majesty's service, in which case the party making the affidavit cannot swear this, because he is ignorant of the instructions given to the commander. And it seems, that an affidavit, stating the witness is not expected to return till a particular day, is sufficient, it being an implied assertion, that he is expected at that time: 2 Chit. R. 411. It is also stated to be necessary for the oath to be positive that the witness absent is material, and not merely that the deponent believes him to be so; for nothing is more easy than generally to swear to a belief of this description: 1 Bla. R. 514. In some cases, the sources of the proposed required evidence should be stated with punctuality. When there is no cause for suspicion of mere desire to delay, it will be sufficient generally to swear that the absent party is a material witness, without whose evidence the party cannot safely proceed to trial; that he has endeavoured, without

Annotation (*continued*)—Continuance and Adjournment (§ II—8)—Criminal Law—Postponement of trial—Cr. Code (1906) sec. 901.

effect, to serve him with a subpoena, and that there is a reasonable ground to expect his future attendance: 8 East 37. And the affidavit should also state the notice to the opposite party, and the service of it upon him. But if there is any cause of suspicion, the Court will require the circumstances to be specifically stated, on which the application is grounded; that the party absent is a material witness; that the applicant has used all his exertions to procure his attendance; and that there is a reasonable expectation of his being able to attend at the time to which the trial is proposed to be deferred. It must, in general, be made by the party applying, though, in some cases, his attorney, or a third person, have been allowed to do it in his stead, as if he be abroad, or unable to appear: Tidd Prac. 834. It should regularly be made two days at least before the intended trial; but when the necessity of the witness was not known until afterwards, it may be applied for at a nearer period. When the motion is granted, it is seldom for more than the next term or the ensuing assizes: Chitty Cr. Prac., 492.

[SUPREME COURT OF ONTARIO.]

APPELLATE DIVISION.

BEFORE SIR WILLIAM MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, AND LEITCH, JJ.

REX v. RAPP.

1. CRIMINAL LAW (§ IV D—122)—SENTENCE AND IMPRISONMENT—RUNNING OF SENTENCE—CONVICT ALLOWED AT LIBERTY ON BAIL PENDING APPEAL—QUASHING OF APPEAL.

Where a person under sentence for an indictable offence was improperly given his liberty by taking bail for an appeal where no appeal lay, the time during which the convict was at liberty between the giving of bail and the quashing of the appeal does not run in his favour, although he had served a part of the sentence before bail was accepted; the period of the bail in such case is within sec. 3 of the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, enacting that the time during which a convict is "out on bail" shall not be reckoned as part of his sentence; and his continuance at liberty after the quashing of the appeal constitutes an "escape" under Cr. Code sec. 106, and on being re-taken he must serve the remainder of the time for which his sentence was to run.

[*Robinson v. Morris*, 23 Can. Cr. Cas. 209, 19 O.L.R. 633. applied.]

ARGUED: March 6, 1914.

DECIDED: March 8, 1914.

APPEAL by the defendant from an order of MIDDLETON, J., in Chambers, refusing the defendant a writ of *habeas corpus*.

The defendant was, on the 17th October, 1913, convicted by a Police Magistrate of an assault, occasioning bodily harm (Cr. Code, 1906, sec. 295), and sentenced to thirty days' imprisonment, and on the same day entered upon his sentence. On the following day, he was admitted to bail and released from gaol, pending an appeal to the Sessions. On the 2nd December, his case came before the Sessions, where it was held that no appeal lay. The defendant was present in court, but was not returned to the gaol; and, no one interfering, he left the court-room, and remained at large until the 3rd March, 1914, when, by order of the Sessions, he was re-arrested and returned to gaol to complete his sentence; and, in these circumstances, applied for the writ with a view of moving for his discharge.

G. R. Roach, for the defendant, argued that the prisoner's sentence had expired prior to his re-arrest on the 3rd March, as the time began to run on the 17th October, 1913, and nothing that occurred afterwards interrupted it: The Prisons and Reformatories Act, R.S.C. 1906, ch. 148, sec. 3. The writ of *habeas corpus* should, consequently, have been granted: *Rex v. Robinson* (1907), 14 O.L.R. 519; *Robinson v. Morris* (1909), 19 O.L.R. 633.

J. R. Cartwright, K.C., for the Crown, contended that the time of imprisonment did not run from the day the prisoner was admitted to bail until he surrendered himself on the 2nd December, and that from then till his re-arrest on the 3rd March, he was at large, but not on bail: sec. 185 of the Criminal Code. It was the prisoner's duty to have remained in custody on the 2nd December, and his failing to do so constituted an escape within the meaning of sec. 196 of the Code.

Roach, in reply.

March 8. MULOCK, C.J.Ex.:—This is an appeal from Middleton, J., refusing the prisoner a writ of *habeas corpus*. The facts

are as follows. On the 17th October, 1913, the prisoner was convicted by the Police Magistrate of an assault causing bodily harm, and was sentenced to thirty days' imprisonment in the common gaol, and on the same day entered upon his sentence. On the 18th October, he applied for and was admitted to bail, pending an appeal to the Court of Quarter Sessions. On the 2nd December, he attended before the Court of Quarter Sessions, when his case was dealt with by the presiding Judge, who held that no appeal lay to the Sessions. The prisoner was not, however, returned to the gaol; and, no one interfering, he left the court-room, and remained at large until the 3rd March, when, in consequence of notice from the Court of Quarter Sessions, he appeared before that Court, and, on the order of the presiding Judge, was returned to the gaol to complete his sentence.

On the appeal before us, the prisoner's counsel contended that, the prisoner having entered upon his sentence on the 17th October, the subsequent occurrence had not the effect of interrupting the running of his sentence, and that, accordingly, it had expired prior to his re-arrest on the 3rd March. The case is really concluded against the prisoner by *Robinson v. Morris*, 19 O.L.R. 633.

From the 18th October until the 2nd December, the prisoner was out on bail. The order liberating him on bail was made on his own motion, and he complied with its terms by entering into a recognizance to appear at the Sessions. Having obtained his liberty by reason of these bail proceedings, even though they were unauthorised, he cannot now be heard to say that he was not out on bail. They constituted a lawful excuse for his being at large.

Section 3 of the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, provides that the time during which a convict is out on bail shall not be reckoned as part of his sentence. That section is as follows: "The term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on or from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced."

I, therefore, think that his term of imprisonment did not

run from the day he was admitted to bail until he surrendered himself on the 2nd December. From that day until his re-arrest on the 3rd March he was at large, but not on bail.

When he surrendered himself to the Court on the 2nd December, he then became a prisoner in respect of his unexpired term of imprisonment, which then again began to run, and his legal obligation was to return to the gaol to serve there the remainder of his sentence.

"As all persons are bound to submit themselves to the judgment of the law . . . whoever, in any case, refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, is guilty of a high contempt, punishable with fine and imprisonment:" 2 Hawk. P.C. ch. 17, sec. 5. "And if by the consent or negligence of the gaoler, the prison doors are opened and the prisoner escapes without making use of any force or violence, he is guilty of a misdemeanour:" 1 Hale P.C. 611.

And now, by sec. 185 of the Criminal Code, R.S.C. 1906, ch. 146: "Every one is guilty of an indictable offence and liable to two years' imprisonment who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him."

No lawful excuse appearing for the prisoner being at large on or after the 2nd December, this section makes it abundantly clear that it was his duty to have remained in custody. Did his failing to do so constitute an escape within the meaning of sec. 196 of the Criminal Code? That section is as follows: "Every one who escapes from custody, shall, on being retaken, serve, in the prison to which he was sentenced, a term equivalent to the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape."

The following is the generally accepted definition of what constitutes an escape: "An escape is where one who is arrested gains his liberty before he is delivered by the Courts of the Law (*Termes de la Ley*):" Russell on Crimes and Misdemeanours, 6th ed., vol. 1 p. 889.

The prisoner was under arrest when he surrendered on the 2nd December, and on that day unlawfully gained his liberty, that is, he had not been "delivered by the course of the law." Thus he was guilty of an escape, and sec. 196 applies, and he must serve a term equivalent to the remainder of his unexpired term.

I therefore think that Mr. Justice Middleton was right in refusing the writ, and this appeal must be dismissed.

CLUTE, SUTHERLAND, and LEITCH, JJ., agreed.

RIDDELL, J.:—William Rapp was convicted by the Police Magistrate for the City of Toronto, on the 17th October, 1913, of an assault occasioning bodily harm, and was sentenced to thirty days' imprisonment. Being taken to the gaol, he consulted a solicitor, who advised an appeal to the Sessions. On the 18th October, the prisoner was released on bail by a magistrate, to appear at the Sessions. On the 2nd December, he went to the Sessions to prosecute his appeal, and of course found that no such proceeding could be taken in that Court. He left the court-room without any attempt on the part of police or others to restrain him. On the 3rd March, he was arrested to serve his sentence; on the 5th March, he applied to Mr. Justice Middleton for a writ of habeas corpus, and was refused. He now appeals to this Court.

The statute R.S.C. 1906, ch. 148, sec. 3, provides: "The term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced."

The appellant contends that his term began when he was sentenced; and he is undoubtedly right. Then he admits that from the 18th October till the 2nd December he was under bail, and that period cannot count by reason of sec. 3 just quoted; but he says that after the 2nd December, his bail being cancelled, the section does not apply, and his term was running on at least for twenty-eight days. In this he may be partly

right, and is certainly at least partly wrong. Section 3 expressly mentioning bail, it may well be *expressio unius, exclusio alterius*, and no other time is excluded by this section. But he has a much more formidable difficulty to encounter. The Criminal Code, R.S.C. 1906, ch. 146, sec. 196, provides: "Every one who escapes from custody, shall, on being retaken, serve, in the prison to which he was sentenced, a term equivalent to the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape."

The magistrate had no authority to admit to bail; in such a case the prisoner taking advantage of such permission is guilty of an escape. This was considered in *Rex v. Robinson*, 14 O.L.R. 519. At p. 522 it is said that "if . . . the applicant had taken any part, however small—*e.g.*, by requesting or urging it—in procuring his release, he might well be considered guilty" of an escape. In the particular case I thought the prisoner was not so guilty, because he had simply done as he was told by the authorities; but my error was authoritatively corrected by the Court of Appeal in *Robinson v. Morris*, 19 O.L.R. 633.

"An escape is where one who is arrested gains his liberty before he is delivered by due course of law (*Termes de la Ley*):" Russell on Crimes and Misdemeanours, 7th ed., vol. 1, p. 555. "It is . . . criminal in a prisoner to escape from lawful confinement on a criminal charge though no force or artifice be used on his part to effect such purpose. Thus, a prisoner is guilty of a misdemeanour if he goes out of his prison by license of the keeper (*Attorney-General v. Hobert* (1631), Cro. Car. 210), without any obstruction . . . or if he escapes in any other manner, without using any kind of force or violence:" Russell on Crimes and Misdemeanours, 7th ed., vol. 1, p. 555. "A person who has power to bail is guilty . . . of negligent escape by bailing one who is not bailable:" Russell on Crimes and Misdemeanours, 7th ed., vol. 1, p. 557.

The prisoner gained his liberty before he was delivered by due course of law, and this is an escape; he, therefore, comes under the provisions of sec. 196, and must serve his term. But

whether he should be prosecuted under sec. 185 of the Code is for the authorities.

It cannot be made too clear that when any one is arrested, he does not cease to be a member of the community, bound to obey and assist in enforcing its laws; he does not become a quarry with the right to use every wile to effect an escape, the rest of the community being the hunter bound to give him a sporting chance. If he leaves the prison, he commits a crime equally with the gaoler who allows him to do so; if he leaves the custody of a policeman, he is equally guilty with the policeman who permits it. By committing a crime no man can become in law an Ishmael with his hand against every man, even if he thinks every man's hand is against him.

The appeal should be dismissed.

Order accordingly.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE MOSS, C.J.O., OSLER, GARROW, MACLAREN, AND
MEREDITH, JJ.A.

ROBINSON v. MORRIS.

I. CRIMINAL LAW (§ IV D—122)—SENTENCE AND IMPRISONMENT—RUNNING OF SENTENCE ON SUMMARY CONVICTION.

On a summary conviction awarding imprisonment for four months for a second offence against a liquor law, the defendant who had been allowed at the time of sentence to go at large upon his recognizance to appear when called upon, is not entitled to have the period for which he was so at liberty prior to arrest upon a warrant of commitment counted as part of the four months' term.

[*R. v. Robinson*, 12 Can. Cr. Cas. 447, 14 O.L.R. 519, overruled; *R. v. Taylor*, 12 Can. Cr. Cas. 244, referred to.]

DECIDED: November 15, 1909.

APPEAL by the plaintiff from the judgment of a Divisional Court affirming the judgment at trial whereby the action had been dismissed.

The plaintiff was convicted by the police Magistrate for the town of North Toronto as for a second offence of having sold in-

toxicating liquor without a license contrary to the provisions of the Liquor License Act, and was adjudged to be imprisoned therefor for four months. He was allowed to go at large, upon his own recognizance to appear when called upon; two months later he was arrested by the defendant Morris, a constable of the town of North Toronto, under a warrant of commitment issued by the magistrate (without notice to the plaintiff) and delivered to the keeper of the gaol, who was thereby directed to receive the plaintiff and keep him in custody for four months.

Before he had served four months, but after a period of four months following the date of the conviction, the plaintiff was discharged (*Rex v. Robinson*, 12 Can. Cr. Cas. 447, 14 O.L.R. 519), on the ground that the term of his imprisonment expired in four months from the date of passing sentence. This action was brought against Morris and the town corporation for trespass and false imprisonment. A notice of action was served in which the cause of action was stated as being assault and false imprisonment of the plaintiff.

J. B. Mackenzie, for plaintiff.

C. J. Holman, K.C., for defendant Morris.

T. A. Gibson, for the defendant municipality.

THE COURT held, that, if sec. 3 of the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, did not apply to a commitment on summary conviction for an offence against an Ontario Act, the term of imprisonment under the conviction would not commence until the plaintiff's arrest or his lodgment in gaol; but, if the enactment did apply, the plaintiff was in fact "out on bail" whether regularly and properly or not from the date of the sentence till his arrest on the warrant of commitment, and, by the very terms of the section, the intermediate period was not to be reckoned as part of the term of imprisonment. The imprisonment was, therefore, lawful, and the action failed. *Rex v. Robinson* (1907), 14 O.L.R. 519, 12 Can. Cr. Cas. 447, was overruled. Morris was held not to be the servant or agent of the town corporation in executing the warrant, and there was no ground for making the corporation a party.

The following cases were referred to, *inter alia*, *R. v. Johnson* (1901), 4 Can. Cr. Cas. 178; *R. v. McDonald*, 6 Can. Cr. Cas. 1; *R. v. Taylor* (1906), 12 Can. Cr. Cas. 244. It was held that the action was properly dismissed.

Appeal dismissed.

[COUNTY COURT FOR DISTRICT No. 6, NOVA SCOTIA.]

BEFORE HIS HONOUR, JUDGE MACGILLIVRAY.

REX v. CODY.

1. JUSTICE OF THE PEACE (§ I—2)—APPOINTMENT—TERRITORIAL JURISDICTION.

Although the authority of county justices of the peace is confined to the limits of the county for which they are named, it does not necessarily extend to all places within the county, if there be any district therein which possess a separate and exclusive jurisdiction; and if concurrent jurisdiction is to be exercised by the county judges in such separate jurisdiction the commission should so state in express words such as the phrase "as well within liberties as without."

[Paley on Convictions, 7th ed., 34, referred to.]

2. INTOXICATING LIQUORS (§ III J—91)—TRIAL OF OFFENDERS—EXCLUSIVE JURISDICTION OF TOWN STIPENDIARY MAGISTRATE — NOVA SCOTIA TEMPERANCE ACT, 1900.

The provision of the Towns Incorporation Act, R.S.N.S. 1900, ch. 71, secs. 233 and 234, whereby a police office is established where "all the police business of the town shall be transacted," and whereby the police court is presided over by a stipendiary magistrate for the town exercising therein "all the jurisdiction of two justices of the peace or a stipendiary magistrate" has the effect of establishing a separate and exclusive jurisdiction and of taking away the jurisdiction of county justices to try an offence against the Nova Scotia Temperance Act 1900, where the commissions to county justices do not expressly include the town, and this although the Temperance Act provides that prosecutions thereunder may be brought before "any magistrate" having jurisdiction where the offence was committed and defines magistrate as a "stipendiary magistrate or two justices."

3. INTOXICATING LIQUORS (§ III A—55)—UNLAWFUL SALES—PROVINCIAL CRIMINAL LAW—CRIMINAL OFFENCE.

The unlawful sale of intoxicating liquor in contravention of the Nova Scotia Temperance Act 1900, is a "criminal offence" against a provincial criminal law.

[*Re McNutt*, 21 Can. Cr. Cas. 157, 10 D.L.R. 832, 47 Can. S.C.R. 259, applied].

DECIDED: August 11, 1914.

APPEAL by the defendant from his conviction for selling

intoxicating liquor in his hotel in the Town of Inverness, contrary to the provisions of the Nova Scotia Temperance Act, 1910.

J. L. McDougall, for appellant.

Danl. McNeil K.C., for respondent.

JUDGE MACGILLIVRAY:—The Town of Inverness, within the County of Inverness, is incorporated under the provisions of the Towns Incorporation Act, Chapter 71, R. Stats. N.S. 1900. The accused was tried and convicted by and before two Justices of the Peace in and for said county, sitting in said town.

The defendant appealed from the conviction, and in his notice of appeal states a number of grounds, the first and principal of which is that:

"The Justices of the Peace who tried this cause and made the conviction had no jurisdiction to try the cause or make the conviction."

A number of other grounds are taken: that the Justices are resident ratepayers of the town; that the conviction is against law and evidence; no evidence; defendant not charged as "owner" or "occupant."

Under the procedure as provided by the Act, the evidence in the Court below is evidence on this appeal. On reading the evidence and applying the law, I find against all the grounds taken except the ground first above stated.

Counsel for the defendant in support of this ground contends that the Stipendiary Magistrate, a functionary presiding in the police office of the town, is the only tribunal which could legally take cognizance of any offence against the provisions of the Temperance Act. He cites the provisions of the Towns Incorporation Act, respecting the erection and constitution of municipal courts—the provision of the Act respecting the appointment of Stipendiary and Deputy Stipendiary Magistrates for incorporated towns respecting the establishing of a police office in the town and the duty of the Stipendiary Magistrate to preside therein, and respecting the prosecution for criminal offences and penalties therefor.

He argues that the effect of all these provisions is that prosecutions for penalties, for violating the provisions of the Nova

Scotia Temperance Act, should be brought before the town magistrate when the offence is committed within an incorporated town, who, he contends, has exclusive jurisdiction to try such offences.

Counsel for the Crown cites sub-section 2 of section 35 of the Act to the effect that, "such prosecution may be brought before any magistrate having jurisdiction where the offence was committed"; and refers to the interpretation clause of the Act which reads, "Magistrate means a Stipendiary Magistrate or two Justices of the Peace."

He argues that two Justices of the Peace have concurrent jurisdiction with the Stipendiary Magistrate of the town to hear and determine the complaint against the defendant.

The question to be decided on this appeal is: Have the two Justices of the Peace who heard the complaint of John A. McLeod, Inspector of the Nova Scotia Temperance Act for the Town of Inverness, who says he has just cause to suspect and believe that Dan. R. Cody (the defendant) of said town "did unlawfully sell intoxicating liquor without the authority by law required and contrary to the provisions of the Nova Scotia Temperance Act and Acts in amendment thereof," concurrent jurisdiction with the Stipendiary Magistrate presiding in the town police office to hear and determine the charge preferred against the accused?

The offence charged is a criminal one committed within the incorporated Town of Inverness. In *Re McNutt*, 47 Can. S.C.R. 259, 21 Can. Cr. Cas. 157, 10 D.L.R. 832, the Supreme Court of Canada hearing an appeal from the Supreme Court of Nova Scotia affirming the judgment of the Judge who refused to discharge the appellant from imprisonment on a conviction for keeping liquor for sale in violation of the Nova Scotia Temperance Act, decided that such violation is a criminal offence.

"We have therefore in this case all the necessary elements of an offence against what has been not inaptly described as a provincial criminal law"—per Fitzpatrick, C.J., at p. 262.

During the argument on appeal in the above cited case a preliminary objection had been raised that the offence charged was a criminal offence, and that the charge in that case was a criminal charge, and that an appeal is given by sec. 39 (c) of the Supreme Court of Canada Act only from a judgment in any

cause or proceeding for or on a writ of *habeas corpus* not arising out of a criminal charge.

The offence charged against the appellant being a criminal offence, triable summarily, it is claimed that the accused should be tried in the police office established in the Town of Inverness, and before the Stipendiary of the town presiding therein. Sections 233 and 234 of the Towns Incorporation Act provides that:

"233. There shall be in the town a police office to be established by the Town Council where all the police business of the town shall be transacted.

"234. The Stipendiary Magistrate shall attend at such police office daily or at such times or at such periods as are necessary for the disposal of the business brought before him as a Justice of the Peace or a Stipendiary Magistrate, and shall have, possess, and exercise within the town all the jurisdiction, power and authority of two Justices of the Peace, or a Stipendiary Magistrate, for the apprehension, committal, conviction and punishment of criminal offences, and to carry into effect the provisions of this chapter and of the laws in force, and the by-laws and ordinances of the Town."

It may be here observed that temperance legislation in this and several other provinces in the Dominion had the effect, in many countries, of prohibiting the sale by retail of intoxicating liquors, excepting for medical, mechanical and sacramental purposes.

In the early days of Confederation it was contended that such legislation was in restraint of trade, and consequently *ultra vires* of the Provincial Parliament.

But the constitutionality of this legislation, by the Provinces, was upheld on the ground that the object of such legislative enactment was to ensure peace and good order in the community, which were matters of police regulation.

As far back as 1876 in the case of *Keefe v. McLennan*, 11 N.S.R. 5, the full Bench decided that the local Legislature had not exceeded its powers in legislating that the Court of Sessions of a county could refuse to grant licenses within the county for the sale of intoxicating liquors; that such legislation was not in contravention of the provisions of sec. 91 of the B.N.A. Act, respecting the regulation of trade and commerce which are within

the exclusive powers of the Federal Parliament. Ritchie E. J., delivering the judgment of the Court at p. 10 says:—

“It will be borne in mind that the enactment is not one whereby *all trade* in intoxicating liquors is, or can be wholly prevented. The sole object of the Legislature was unquestionably the promotion of temperance and the protection of the health and morals of the people, and the preservation of the peace and good order of the community, matters of police.”

The decision of the courts in the various Provinces, from time to time, upheld the *prohibitive* clauses of temperance legislation; and finally the point was settled by the Privy Council in *Hodge v. The Queen*, 9 App. Cas. 117, upholding the validity of the Ontario Liquor License Act.

Sir Barnes Peacock delivering the judgment of the Board, at p. 160 says:—

“Their Lordships consider that the powers intended by the Act in question when properly understood are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of towns, etc.”

The provisions of the N.S. Temperance Act when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of the Town of Inverness as well as for other towns and municipalities in the Province, to which the Act applies. The town has, under the provisions of the Towns Incorporation Act, a court or police office presided over by the Stipendiary Magistrate of the town, who has unquestionable jurisdiction to cause to apprehend, and to convict and punish for criminal offences, and for carrying into effect the provisions of the laws in force in the town, any person contravening any of these laws. The Stipendiary Magistrate of the town had jurisdiction to try the defendant for the offence with which he is charged; and I am of opinion that the court presided over in the police office at Inverness was the proper tribunal before which he should be tried.

However, this determination does not dispose of the question raised at this trial, viz., had the two Justices of the Peace who heard the complaint of the informant against the defendant,

concurrent jurisdiction with the Stipendiary Magistrate of the town to hear and determine the charge in the complaint?

On this branch of the case the question arises: what are the jurisdiction and powers of the two Justices of the Peace who presided in the Court below, if any, over offences committed within the Town of Inverness and summarily triable?

The town was incorporated in the month of April, 1904. I obtained from the Justices their commissions; and I find that they were appointed respectively on the 17th of May, 1904, and the 11th of March, 1909. They are appointed Justices of the Peace for the County of Inverness. The commission issued to William D. Lawrence, appointed on the first-named date, invests him "with all the powers and authorities specified and contained in a commission of the peace for the said county, bearing date the twentieth day of November in the year of Our Lord One Thousand Eight Hundred and Forty-eight, as fully as if your name had been inserted therein;" and the commission issued to Dougald A. Smith appointed on the last-mentioned date invests him "with all the powers, rights and privileges, immunities and advantages, which to the said office do or may lawfully appertain."

What were the rights and powers conferred on Justices of the Peace by the commission of the 20th of November, 1848, I am unable to find. In correspondence with the Deputy Provincial Secretary, he informs me that all Commissions of the Peace had been rescinded and a batch of Justices of the Peace for each county were appointed by a general commission of the date of the 20th November, 1848, and sent to the custos of each county; but none of the municipal clerks appear to have that commission. By the way, this is the year, 1848, that free parliamentary government was established beyond dispute by the granting of responsible government to Nova Scotia. The Municipal Clerk of the County of Inverness informs me that the office of the Clerk of the Peace for that county was destroyed by fire in 1862 and all county records of every kind were burnt. There is no record of the form of the commission in the books of the executive council of that date in the Provincial Secretary's office. Nor does the Act of 1880, chap. 17 (c. 38 R.S.N.S. 1900) define the rights, powers, etc., of Justices of the Peace appointed by the Lieutenant-Governor-in-Council under the provisions of that Act.

The provisions respecting such rights are contained in sec. 4 of the Act (recast by sec. 5 of c. 38) and read:—

“Every person so appointed and sworn shall be invested with all the rights, powers, privileges, immunities and advantages heretofore had, held, exercised and enjoyed by any Justice of the Peace heretofore appointed in this Province, and shall be entitled to the rights, privileges, immunities and advantages heretofore given, granted, extended to any Justice of the Peace as well by any statute in force in this Province or otherwise.”

What these “rights, powers, etc.” given, granted and extended to any Justice of the Peace at the time of the above cited statute were, can only be ascertained by reference to the commission issued to these Justices, if this provision of the statute contemplated the powers, etc., recited in the commission, and to those statutes, if any, defining their powers; and also statutes passed from time to time for the good of the peace, which, though not specified in their commission, yet were committed to their charge and care. I have obtained a commission of the peace issued to a Justice of the Peace for the said County of Inverness on the 5th of October, 1850, and I find that the appointee is “invested with all the powers and authorities specified and contained in a commission of the peace for the said county bearing date the 20th day of November, A.D. 1848, “in as full and ample manner as if your name had been inserted therein.” It would seem that all commissions of the peace issued after the last-mentioned date incorporate by reference only “all the powers and authorities specified” in the commission of the said date. In view of Paley’s statement of the law respecting jurisdiction of county Justices in incorporated towns within a county, it is necessary that the extent of the powers and jurisdiction contained in the commission to the Justices in the Court below be ascertained. Paley on Convictions, 7th ed., treating of the local limits of the jurisdiction of Justices of the Peace, at p. 34 *et seq.*, says:—

“Although on the one hand the authority of county Justices is confined to the limits of the county for which they are named, yet, on the other hand, it does not necessarily extend to all places within the county, if there be any district therein which possesses a separate and exclusive jurisdiction.

“The words of the commission, however, ‘as well within liber-

ties as without' are held to give the Justices of the county jurisdiction in such boroughs and towns corporate as are not counties in themselves, though they have a magistrate of their own, unless the charter by which they are constituted imports an express exclusion of the county magistrates by a clause of *non intromittant*."

"But where the jurisdiction of the county Justices is taken away by express and adequate words in the charter for that purpose, and there is a separate Court of Quarter Sessions, any act of theirs within the franchise is not only a contempt, but is wholly void."

I am convinced that the words of the clause of the Towns Incorporation Act in relation to the establishing of a police office in the town are *express and adequate words*, to take away the jurisdiction of the county Justices.

"There shall be in the town a police office to be established by the town council where all the police business of the town *shall* be transacted."

Such court is duly established in the Town of Inverness. It is presided over by a duly appointed Stipendiary Magistrate who possesses and exercises within the town "all the jurisdiction, power and authority of two Justices of the Peace, or a Stipendiary Magistrate, for the apprehension, conviction and punishment of persons charged with criminal offences."

It has been shewn that a violation of the provisions of Part II of the Nova Scotia Temperance Act is a criminal offence; and that these provisions are for the peace and good government of the town,—a police regulation.

The express mention of the tribunal before which such offence is to be tried, seems to me to exclude the jurisdiction of the county Justices: *expressio unius exclusio alterius*.

But it is contended that the interpretation clause of the Temperance Act defines Magistrate before whom prosecution for the offence with which the defendant is charged to mean a "Stipendiary Magistrate or two Justices of the Peace."

But the Magistrate must have "jurisdiction where the offence was committed."

As to the question of jurisdiction we are remitted to the commission issued to these Justices.

Do these commissions, incorporating the rights, powers, etc., contained in the general commissions of 1848, contain the phrase "as well within liberties as without?" These words are written in parentheses in the forms given in Burn's J. P. and Marshall's, J.P., indicating that they are not in all commissions of the peace. As the commission of 1848 is not available we have come to an *impasse*, so to speak.

But it is said that there is a way out of every difficulty if one can find the way. The only way out of this difficulty, it seems to me, is to treat the rights, powers, etc., *specified and contained in a commission of the peace for the said county bearing date the 20th November, 1848*, as non-existent, when no record of these rights, etc., can be found; and treat the office of a Justice of the Peace in such case as a functionary deriving his powers by virtue of his office from the common law, and those conferred upon him by virtue of the statutes made for the better keeping of the peace and committed to him. To ascertain such powers and the ambit of his jurisdiction we must begin at the beginning.

The office of Justice of the Peace is one of great antiquity, and his jurisdiction has varied from time to time. Before the institution of Justices of the Peace there were conservators of the peace in every county, whose office was to conserve the King's peace and protect his subjects from force and violence. They were selected by the freeholders in the County Court, out of the principal men of the country.

. This power to assign commissions of the peace was transferred from the electorate to the King by I. Ed. 3, c. 16.

"For the better keeping and maintenance of the peace, the King will, that in every county good men and lawful which be no maintainers of evil or barretors in the country, shall be assigned to keep the peace."

Appointees by the King under the provisions of this statute were termed Justices of the Peace. They had yet no judicial functions; they were officers at common law assigned to keep the King's peace within the territorial divisions for which they were appointed.

They were subsequently given judicial powers (vide 34 Ed. 3, c. I.) and numerous other Statutes giving them judicial powers, passed from time to time down within our own time).

The King delegated his prerogative power to appoint Justices of the Peace to the governors of his colonial possessions. This power he included in his commission. Governor Cornwallis, by virtue of his commission, after his constitution of the Council of Twelve, appointed four Justices of the Peace for Townships of Halifax, on the 18th of July, 1749, nine years before a Legislative Assembly was granted to Nova Scotia. (Vide N.S. Archives, vol. 1, p. 571.) The form of Justices of the Peace's commission was settled in Michaelmas Term, 1590, and the same was commanded to be used, and continues, with very little alteration, to be still used in England; and also in this Province at least down to 1848. Whether any change had been made in the form of the general commission of the peace issued to each county in that year, as already stated, I am not able to ascertain. I must therefore take it that the two justices who tried the charge against the defendant were Justices of the Peace at common law. I am strongly of opinion that the rights, powers, privileges, immunities and advantages with which Justices of the Peace are invested under the provisions of sec. 5, c. 38, R.S.N.S. 1900, on their appointment, are those held, had, exercised and enjoyed by Justices of the Peace at common law, and the statutes committed to their care. To expressly confer judicial powers and to enumerate offences over which they had power to punish under the form enlarged from time to time and finally the form settled upon in the reign of Elizabeth, was considered unnecessary in view of the fact that the statutes particularly given in charge to Justices of the Peace confer jurisdiction upon them by the provisions of such statutes. Indeed I think it is safe to state that all the powers exercised judicially by Justices of the Peace in this country are derived from the statutes committed to their charge, and provisions giving them judicial powers and authority in certain statutes. If this is the correct interpretation of the provisions of said section 5, it becomes unnecessary to trouble oneself with the rights, powers, etc., contained in the commission of the 20th of November, 1848.

The Justices who tried this case in the Court below were appointed Justices for the county after the town was incorporated.

In view of the duty of the Stipendiary Magistrate of the town to preside in the police office of the town where all the police

business of the town *shall be transacted*, the Governor in Council, well knowing the effect of this provision in the Towns Incorporation Act, *ipso facto* confined the jurisdiction of these Justices of the Peace to the area of the county outside the incorporated Town of Inverness, particularly as to offences against the police regulations of the town.

This, I think, is the case with every commission appointing Justices of the Peace in every county in the province within whose boundary there is an incorporated town.

Let me again refer to the provision respecting the tribunal before which proceeding for violation of the penal provisions of the Temperance Act may be brought:—

“Such prosecution may be brought before any Magistrate having jurisdiction where the offence was committed.”

We have seen that “Magistrate” means a Stipendiary Magistrate or two Justices of the Peace.

There are two classes of Stipendiary Magistrates, Town and Municipal. The Stipendiary for a municipality—county or subdivision of a county—has no jurisdiction by virtue of his office to preside in the police office of an incorporated town. In certain cases he may be called in by the Stipendiary for the town. But two Justices of the Peace, the equivalent of a Stipendiary cannot be called in; and in no case can they be given jurisdiction to preside in a town police court, to dispose of the business brought before them as such Justices of the Peace in said office. To the Stipendiary Magistrate appointed for the town is given alone the power and authority to preside in such office. His deputy, or certain functionaries called in by him, may preside in his place. If the offence were committed in the county, outside the incorporated town, two Justices of the Peace would have jurisdiction as well as a Stipendiary for the municipality of the county to try and determine the same. This view of the law I apprehend explains the meaning of the phrase *having jurisdiction where the offence was committed*. Offences *sui generis* with the offence charged against the defendant are to be tried in the town police office. “There shall be in the town a police office to be established by the Town Council where all the police business of the town *shall be transacted*.”

It will be seen that it is imperative that *all the police business of the town* is to be transacted in the police office.

It is not claimed that two Justices of the Peace have any authority to preside in the town police office. I am therefore of opinion that the effect of the provisions of the Towns Incorporation Act, respecting the constitution of a tribunal to try and punish summarily criminal offences committed with the town expressly, takes away the jurisdiction of the County Justices to try these offences; wherefore, I decide that the two Justices of the Peace who tried and convicted the defendant had no jurisdiction to entertain the charge preferred against him.

There was no reason alleged why the prosecution had not been brought before the Stipendiary Magistrate of the town, who is a practising barrister, and a man in every way competent for his office.

The conviction herein appealed from shall be quashed but without costs.

Conviction quashed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE GRAHAM, E.J., MEAGHER, RUSSELL AND DRYSDALE, JJ.

REX v. SULLIVAN.

1. COSTS (§ 1—12)—CERTIORARI PROCEEDINGS—OFFENCE AGAINST TOWN ORDINANCE—CRIMINAL MATTER—UNOPPOSED MOTION.

Where a conviction under a municipal ordinance has been removed by writ of certiorari and is quashed by the Court for want of jurisdiction in the convicting justice, and terms are imposed that no action is to be brought against the prosecutor, the Court has jurisdiction and discretion to give or withhold costs and may do so even though the motions for the writ and to quash are unopposed.

DECIDED: June 1, 1914.

MOTION to vary order quashing a summary conviction with costs.

The defendant was convicted after preliminary arrest under the R.S.N.S. 1900, ch. 71, sec. 263 (67), by the stipendiary magistrate of the town of Stewiacke, and fined \$10.00 and, in de-

fault of payment, imprisonment for one month, etc., etc., for unlawfully selling musical instruments without the license required by law. The conviction was removed into the Supreme Court by writ of *certiorari* on the order of a Judge at Chambers, and was afterwards quashed for want of jurisdiction in the convicting justice, at the March term, 1914, by the Court *en banc*, which ordered that no action should be brought against the prosecutor. Both applications were made on notice to the prosecutor, but neither was opposed, and, by the order quashing the conviction, the costs of both motions were given to the defendant against the prosecutor, the mayor of the town.

HALIFAX, June 1, 1914.

J. J. Power, K.C., for the prosecutor, moved the Court *ex parte* for an order *nisi* returnable next term to strike out that part of the order quashing the conviction giving the defendant the costs of the motions on the ground that, apart from the question of its jurisdiction, the practice of the Court under the Crown Rules was not to give costs on unopposed motions in criminal cases, on motions for writs of *certiorari* and for quashing convictions thereunder, and cited N.S. Crown Rules, 34 and 191; *Re McNutt*, 21 Can. Cr. Cas. 157, 10 D.L.R. 834, 47 Can. S.C.R. 259; *R. v. Somers*, 1 Can. Cr. Cas. 46; *R. v. Banks*, 1 Can. Cr. Cas. 370; *R. v. McLeod*, 30 N.S.R. 471; *R. v. Smith*, 3 Can. Cr. Cas. 467; R.S.N.S. 1900, ch. 161, sec. 67; *R. v. Crandall*, 27 C.R. 63, 65; *R. v. Steel*, 26 O.R. 540.

THE COURT refused the motion holding that it always had jurisdiction and discretion in such cases to give or withhold costs according to circumstances, and especially where as in this case, terms were imposed that no action should be brought against the persons for whose illegal acts the defendant had suffered, and he cannot recover his expenses in that way.

B. v. Freeman, 21 N.S.R. 483 and *Ricken v. York*, [1908] A.C. 454, referred to.

Order nisi refused.

[SUPREME COURT OF ONTARIO.]

APPELLATE DIVISION.

BEFORE MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, AND
LEITCH, JJ.

REX v. BOOTH.

1. DISORDERLY HOUSES (§ I—5) — CHARGE OF KEEPING — SUMMARY TRIAL WITHOUT OPTION.

Where a police magistrate proceeds with a charge of keeping a disorderly house or common betting house (Code sec. 228 as amended 1909 and 1913) without taking the defendant's election, it is to be assumed that the magistrate is proceeding under Code secs. 773(f), 774 and 781 under which the defendant's election is not required on a summary trial for keeping a disorderly house, but the amount of the fine must not exceed, with the costs of the case, \$200, by virtue of Code sec. 781 as amended 1913.

[*R. v. Honan*, 20 Can. Cr. Cas. 10, 6 D.L.R. 276, 26 O.L.R. 484, and *R. v. Helliwell*, 30 O.L.R. 594, considered.]

2. CRIMINAL LAW (§ IV C—117) — SENTENCE — EXCESSIVE FINE ON SUMMARY TRIAL — CR. CODE SEC. 781.

Where a penalty in excess of the statutory limit of Cr. Code sec. 781 (amendment of 1913) is imposed on a summary trial without consent (Code secs. 773 and 774) on a charge of keeping a disorderly house, the remedy is by certiorari (Cr. Code secs. 599, 797(2) [amendment of 1913] 1124 and 1126) and not by a motion under Cr. Code sec. 1016(2) to the Court of criminal appeal to pass the proper sentence; the latter clause applies only where an appeal may be taken to the Court of Appeal under sec. 1013.

DECIDED: June 15, 1914.

APPLICATION on behalf of the defendant, under sec. 1016(2) of the Criminal Code, to reduce from \$600 to \$200 the amount of the fine which the defendant was ordered to pay, on his conviction by one of the Police Magistrates for the City of Toronto for keeping a disorderly house or common betting house; \$200 being the maximum authorised by the Code as amended. The amendment was not brought to the attention of the Police Magistrate.

May 5. The application was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

A. G. Ross, for the defendant. The defendant was not asked to consent. He was convicted and sentenced by the magistrate

under the Criminal Code, R.S.C. 1906, ch. 146, secs. 227, 228, 773 (f) (amended by 8 & 9 Edw. VII. ch. 9, sec. 2), 774, 781 (repealed and re-enacted by 3 & 4 Geo. V. ch. 13, sec. 27). This application is under sec. 1016(2). As to the necessity for obtaining leave to apply, see *Rex v. Helliwell* (1914), 30 O.L.R. 594; the Criminal Code, sec. 235, as re-enacted by 9 & 10 Edw. VII. ch. 10, sec. 3; *Rex v. Honan* (1912), 20 Can. Cr. Cas. 10, 26 O.L.R. 484, 6 D.L.R. 276.

No one appeared for the Crown.

June 15. The judgment of the Court was delivered by CLUTE, J.:—Motion to reduce the fine from \$600 to \$200 on a conviction by R. E. Kingsford, Police Magistrate for the City of Toronto.

The information charges that the accused, Albert Booth, in the months of October and November, 1913, did, contrary to law, “keep a disorderly house or common betting house at number 371 Danforth avenue, contrary to the form of the statute.”

Neither the information nor the conviction shews under which section of the statute the information was laid. Counsel stated that the accused was not asked to consent; and as, by sec. 774 of the Criminal Code, the jurisdiction of the magistrate is absolute and does not depend upon consent of the person charged, nor shall he be asked whether he consents to be so tried, I assume from the form of the charge and what took place that the information was intended to be laid and tried under secs. 773 (f) and 774 and 781 (referring to clause (f) of sec. 773). Under these sections he had a right to try the accused without his consent.

Section 781, as amended by 3 & 4 Geo. V. ch. 13, sec. 27, declares that where there is a conviction under sec. 773 the penalty of six months' imprisonment and a fine not exceeding with the costs in the case \$200 or both fine and imprisonment not exceeding the said sum and term may be imposed. The fine imposed by the magistrate of \$600 is clearly in excess of what he lawfully might impose under these sections. The prisoner pleaded “guilty,” and it is said, that being so, that he has a right to apply to this Court under sec. 1016, without leave,

and ask the Court to pass a proper sentence. I think that sub-sec. 2 of sec. 1016 refers to appeals under sec. 1013. The appeal under Part XIX., which has reference to "Procedure by Indictment," is given by sec. 1013 to the Court of Appeal, and sub-sec. 1 reads as follows: "An appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases, or of a magistrate proceeding under section 777, on the trial of any person for an indictable offence, shall lie upon the application of such person, if convicted, to the Court of Appeal in the cases hereinafter provided for, *and in no others*" The cases thereafter provided for are where, under sec. 1014, the Court has reserved a question of law and a case is stated. Section 1015 provides that if the Court refuses to reserve the question the Court of Appeal may grant or refuse leave for a stated case. Section 1016, sub-sec. 1, then provides that if leave to appeal is granted a case shall be stated for the Court of Appeal as if the question had been reserved. Sub-section 2 provides that, "if the sentence is alleged to be one which could not by law be passed, either party may without leave, upon giving notice of motion to the other side, move the Court of Appeal to pass a proper sentence." This, with secs. 1014 and 1015, obviously refers to appeals provided under sec. 1013. This section provides for an appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases. The present case does not fall under that clause. It also covers an appeal from the decision of a magistrate proceeding under sec. 777; but sub-sec. 3 of the last-named section expressly excludes cases arising under secs. 780 and 781. The result is, that, by sec. 1013, there lies an appeal for all the cases under sec. 777 which might be tried at the General Sessions (for jurisdiction of Sessions, see secs. 582 and 583), or by consent before a magistrate, but except the class of cases arising under secs. 780 and 781, under which last section, referring to clause (f) of sec. 773, this case falls. There is, therefore, in my opinion, no right given under secs. 1013 and 1016 for a stated case with or without leave, or under sub-sec. 2 of sec. 1016 without leave, where the sentence is alleged to be one which could not by law be passed.

The amendments to secs. 227, 228, 773, 774, 777, and 778, by 8 & 9 Edw. VII. ch. 9, schedule, and to secs. 227 and 235 by 9 & 10 Edw. VII. ch. 10, do not affect the question of appeal in this case.

Formerly an appeal would lie in all cases tried under clause (a) or clause (f) of sec. 773; but, by 3 & 4 Geo. V. ch. 13, sec. 28 (substituting a new section for sec. 797), such appeal is now limited to trials before two Justices. Sub-section 2 of sec. 797, as amended, provides, however, that sec. 1124 shall apply to convictions or orders made under the provisions of this Part, i.e., Part XVI.; and, as secs. 773(f) and 781 are within Part XVI., it covers this case.

Under sec. 1124, a Court or Judge before whom a conviction is removed by *certiorari*, in case the order is in excess of that which might be lawfully imposed, has the like powers in all respects as are given by sec. 754, and may confirm, reverse, or modify the decision notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made.

In *Rex v. Honan*, 20 Can. Cr. Cas. 10, 6 D.L.R. 276, 26 O.L.R. 484, in a case stated by George Taylor Denison, Esquire, Police Magistrate for the City of Toronto, the information charged that the accused kept a common betting house contrary to sec. 227 of the Criminal Code. Upon arraignment the accused asked leave to elect to be tried by a jury. The Police Magistrate ruled that the accused had not the right to elect to be tried by a jury, and that he had absolute jurisdiction and right, under secs. 227 and 228 and clause (f) of sec. 773 and sec. 774, to try the accused summarily without their consent, and accordingly refused the accused the right to elect. This Court held that the magistrate had the right to refuse to allow the accused to elect to be tried by a jury. As the question of jurisdiction was not taken in that case, nor, as far as appears, considered by the Court, that decision should not govern in the present case. See also *Rex v. Helliwell*, 30 O.L.R. 594, where a case was stated under sec. 235 of the Code, which is a provision made against betting and pool-selling in certain cases, and falls

within sub-sec. 1 and is not excluded by sub-sec. 3 of sec. 777. It was held that, as the charge was not one which could be tried summarily without the consent of the accused, as provided in sub-sec. 2 of sec. 778, the ruling of the magistrate was erroneous, the magistrate had no right to refuse to allow the accused to elect, and a new trial was granted in order that the case might be dealt with as provided in sec. 778.

Although there is no appeal to this Court in the present case, the former practice of a motion to quash and removal by *certiorari* is preserved by sec. 599 of the Code, and sec. 1124 indicates the remedy, on security being given as provided by sec. 1126.

It is to be hoped, however, that it may not be necessary to seek this remedy in order to obtain a return of the fine, in so far as it exceeds the sum of \$200.

Motion refused.

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE HAULTAIN, C.J., NEWLANDS, LAMONT, AND BROWN, JJ.

REX v. HOGG.

1. BRIBERY (§ I—5)—CORRUPT OFFER FOR OFFICIAL INFLUENCE.

To corruptly offer to give a sum of money to a member of the Police Commission appointed for a city by its municipal council from amongst its members, for the purpose of inducing such Commissioner to use his official position to aid in procuring the appointment of a third party as Chief of Police by the Board of Police Commissioners is an indictable offence under sec. 163 of the Criminal Code.

[*R. v. Vaughan*, 4 Burr. 2494; *R. v. Casano*, 5 Esp. 231; *R. v. Pollman*, 2 Camp. 229, referred to.]

2. BRIBERY (§ I—5)—SALE OR PURCHASE OF OFFICIAL POSITION—REWARD FOR ASSISTANCE TO PROCURE.

An attempt to improperly procure the appointment of another to the position of Chief of Police for a city by promising a reward to a member of the appointing board for his influence, will not support a charge under sub-section (b) of Code sec. 162 making it an indictable offence directly or indirectly to give a reward for the purchase of an appointment to an office or to agree or promise to do so; such facts do not disclose an attempted sale or purchase of an office under sec. 162 (b), but may sustain a count laid for an attempted offence under sec. 163 (b) relating to giving or procuring rewards "for any interest, request or negotiation about any office."

DECIDED: July 15, 1914.

CROWN case reserved by Elwood, J.

The accused was tried before Elwood, J., and a jury on the following charge:—

“C. J. Hogg, of the City of Regina in the Province of Saskatchewan, stands charged by Herbert E. Sampson, agent within the judicial district of Regina, for the Honourable the Attorney-General of the Province of Saskatchewan, by the direction of the said the Honourable the Attorney-General of the said Province, for that he the said C. J. Hogg, in or about the month of October or November, 1913, at the City of Regina aforesaid, did corruptly and unlawfully offer to give \$500 to James M. Wessel, then a member of the Municipal Council of the City of Regina, and Chairman of the Police Commission for the said city, for the purpose of inducing him, the said James M. Wessel, to use his position as Chairman of the said Police Commission, and as such alderman, to aid in procuring the appointment of Charles A. Mahony as Chief of Police for the City of Regina, and was thereby guilty of attempted bribery;

And further, that he, the said C. J. Hogg, in or about the month of October or November, 1913, at the City of Regina aforesaid, corruptly and unlawfully promised to give to James M. Wessel, then a member of the Municipal Council of the said City of Regina, and Chairman of the Police Commission of the said City \$500 for the purchase of the appointment of Chief of Police of the City of Regina, in favour of Charles A. Mahony;

And, further, that he, the said C. J. Hogg, in or about the month of October or November, 1913, at the City of Regina aforesaid, did corruptly and unlawfully solicit and negotiate about the appointment to the office of Chief of Police of the City of Regina of one Charles A. Mahony, in expectation of profit thereby.”

The third count of this charge was withdrawn from the jury, and the jury found the accused guilty on the first and second counts thereof. The learned trial Judge reserved for the consideration of the Court *en banc* the following questions:—

(1) Was there any offence charged in either the first or second count, and if so, in which?

(2) Does the evidence prove an offence under either the first or second count, and if so, under which?

H. Y. MacDonald, K.C., for the accused.

T. A. Colclough, K.C., Deputy Attorney-General, for the Crown.

HAULTAIN, C.J.:—I cannot agree that the evidence in this case supports a charge under section 161 (b) of the Criminal Code. The “offer, proposal, etc.,” mentioned in that section must be made not only to a member or officer of a municipal council, but must be made in reference to the “passing of a vote or the granting of any contract or advantage” by the municipal council of which the person mentioned is either a member or officer. The person to whom the “proposal or offer, etc.,” is made may be, as in this case, a member or officer of a municipal council, but it must be made to him in that capacity and in relation to some proposed action by the municipal council.

The first count of the charge in question describes Mr. Wessel as a member of the council of the city of Regina and chairman of the police commission for that city. The appointment of a chief of police is made by the police commission and not by the council; so that, in my opinion, an offer made to Mr. Wessel in either of his stated capacities was not made for the purpose of affecting any action by the municipal council. A member of the police commission is not, in my opinion, an “officer” of the council, and even if he is, the promise made in this case was not made to induce an officer of the council to use his influence in that capacity in connection with any vote or other action of that body.

I am, however, of the opinion that the first count states, and the evidence discloses, an attempt to commit the offence defined by section 163 (b) of the Criminal Code. The provisions of that section may be stated as follows: Everyone is guilty of an indictable offence who directly or indirectly gives or procures to be given any profit or reward or makes or procures to be made

any agreement for the giving of any profit or reward for any interest, request or negotiations about any office. I am also of the opinion that the first count states and the evidence discloses an offence under the common law.

Bribery is defined in *Russell on Crimes*, 7th ed., at 627, as "the receiving or offering any undue reward by or to any person whatsoever, in a public office in order to influence his behaviour in office and induce him to act contrary to the known rules of honesty and integrity." It is an indictable misdemeanour at common law to bribe or attempt to bribe any person holding a public office. *Rex v. Vaughan*, 4 Burr. 2494, *Rex v. Casano*, 5 Esp. 231.

An attempt to improperly procure an office by offering a bribe or other improper inducement in an indictable misdemeanour at common law. *Rex v. Vaughan*, *supra*; *Rex v. Pollman*, 2 Camp. 229.

There is no evidence, in my opinion, to support the second count. The evidence does not disclose an attempted sale or purchase of an office, but rather, as stated above an attempt to improperly procure an appointment to an office. See remarks of Mr. Justice Yates in *Rex v. Vaughan*, 4 Burr. 2494, at p. 2501.

The questions submitted for our consideration must therefore be answered as follows:—

Question 1: The first count of the charge is sufficient and charges an attempt to commit the offence defined by section 163 (b) of the Criminal Code. It also sufficiently charges an offence under the common law. The second count charges the offence defined by section 162 (b) of the Criminal Code.

Question 2: The evidence proves the offence under the first count both at common law and under the Criminal Code. The evidence does not prove an offence under the second count.

NEWLANDS, J., concurred with LAMONT, J.

LAMONT, J.:—I agree that the first count states, and the evidence discloses an attempt to commit the offence defined by section 163 (b) of the Code.

BROWN, J. (after stating the facts as above) :—The evidence shews that James M. Wessel was at the time of the matters complained of, a member of the council of the city of Regina and chairman of the board of commissioners of police for the city. The office of chief of police was about to become vacant, and the accused employed one Birkenstock to visit Mr. Wessel, as chairman of the board of police commissioners, and to promise him \$500 if he (Wessel) would use his influence to secure the appointment of one Mahony to the office of chief of police. Wessel exposed the matter, with the result that the accused was prosecuted, committed for trial, and found guilty on the count as aforesaid.

The first count is laid under sub-sec. (b) of sec. 161 of the Criminal Code, and it is contended on behalf of the accused that this section does not apply to the case at bar, for three reasons:—

(1) The chairman of police commissioners is not an officer of the council;

(2) The section contemplates that the action sought for through the officer or member of the council is that of the council itself, whereas, in the case at bar, it was action on the part of the board of police commissioners that was sought;

(3) There was no evidence to shew that the appointment would be of any advantage to Mahony or that he would have accepted same, and that such appointment is not an advantage within the meaning of the section.

The section of the City Act which provides for the appointment of a board of commissioners of police is No. 78, and reads as follows:—

“78. The council may from among its members or otherwise appoint a board of commissioners of police for the city consisting of not more than five members who shall hold office for one year or until their successors are appointed; and if the council appoint such a board then such board upon appointment shall have the sole charge and control of the police force and police department of the city and subject to the provisions of the next following section as to expenditure may exercise all the powers

and authority in respect of the same that the council might have exercised had such a commission not been appointed."

It will be seen that this section refers to members of the board as holding "office." Each member of the board is appointed by the city council to the office of police commissioner, and therefore holds office under the city council and must, in my opinion, be deemed an officer of the council. The mere fact that the members of the board of police commissioners act in the performance of their duties independent of the council does not, in my opinion, make them the less officers of that council. The question of whether or not they are officers does not depend upon the degree of independence which they enjoy in the exercise of their duties, but rather on the fact of their appointment by the council to an office whose duties are such as pertain to the welfare of the city.

With reference to the second objection, I see no reason why the section should be confined to advantages to be granted by the council alone. The statute, in my opinion, is intended to punish any attempt to purchase by bribery the influence of a city official in securing an advantage from the council or a committee of the council or other body, such as the board of police commissioners, which is appointed by the council to perform certain municipal duties in any matter in which the officials as such would have any influence and in which thus the city would be interested. It is equally inimical to the city's interests whether the favour sought is in the gift of the board of police commissioners or the council. In either case it is an attempt to have the official prostitute his office and to thereby improperly gain an advantage from the city. The wording of the English Public Bodies (Corrupt Practices) Act (1889, 52 & 53 Vict. ch. 69), sec. 1, is somewhat instructive on the point. There the language used is as follows:—

"1.—(1) Every person who shall by himself or by or in conjunction with any other person corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer,

or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour.

(2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, *in which such public body as aforesaid is concerned*, shall be guilty of a misdemeanour."

As to the third objection, I am of opinion that it is not necessary to shew that Mahony would have actually profited by the acceptance of the position or would have accepted same if offered him. The word "advantage" is used as descriptive of the thing sought rather than as to the value placed upon it by the person for whom it is sought. By sec. 7 of the English Act above referred to, the expression "advantage" is defined to include *inter alia* any office or dignity. Section 72 of the City Act regards the chief of police as an officer. It reads as follows:—

"The police force shall consist of a chief of police and as many constables or other officers and assistants as may by the council be deemed necessary from time to time."

The position of chief of police is an important office, and the appointment to same must, in my judgment, be considered as an advantage within the meaning of the section.

The second count of the charge is laid under sub-sec. (b) of sec. 162. The whole section reads as follows:—

"Selling or purchasing office.—Every one is guilty of an indictable offence who, directly or indirectly—

(a) sells or agrees to sell any appointment to or resignation of any office, or any consent to any such appointment or resignation, or receives, or agrees to receive, any reward or profit from the sale thereof; or,

(b) purchases or gives any reward or profit for the purchase of any such appointment, resignation or consent, or agrees or promises to do so; and in addition to any other penalty incurred, forfeits any right which he may have in the office and is disabled for life from holding the same."

This section, in my opinion, aims to prevent the selling and purchasing of the office itself, and in this respect differs from sub-sec. (b) of sec. 161, which aims to prevent the purchasing of the influence of the officer or member of the council in securing the office. The facts in the case at bar are such as to bring the same within sub-sec. (b) of sec. 161 rather than sub-sec. (b) of sec. 162.

In the result, therefore, the answer to the first question submitted by the learned trial Judge should be "Yes, in both"; and the answer to the second question should be "Yes; under the first count only."

Conviction affirmed.

REX v. BIRKENSTOCK.

N.B.—Similar questions were reserved in this case, and for the reasons given in *Rex v. Hogg, supra*, the Court *en banc* also affirmed the conviction of this accused.

[POLICE COURT OF MONTREAL.]

BEFORE JUDGE SAINT CYR.

REX v. ROMER et al.

REX v. JOHNSON et al.

REX v. FARRELL et al.

1. SUMMARY CONVICTION (§ III—30) — TRIAL — APPEARANCE BY COUNSEL ONLY.

In a summary conviction matter, the accused may appear by counsel instead of personally and the magistrate has jurisdiction to proceed without requiring the accused to be personally present.

[*Denault v. Robida*, 8 Can. Cr. Cas. 501; *Ex parte Doherty*, 1 Can. Cr. Cas. 84; *Proctor v. Parker*, 3 Can. Cr. Cas. 37; and *R. v. McDonald*, 8 Can. Cr. Cas. 348, referred to; *R. v. Thompson*, 100 L.T. 970, and *R. v. Montgomery*, 102 L.T. 325, applied.]

2. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL WITHOUT CONSENT—WHEN MAGISTRATE TO DECLARE PROCEDURE.

Where a magistrate has jurisdiction over the particular offence either as one for which a summary conviction may be made or as one for which he has power of summary trial as for an indictable offence without the consent of the accused, it is essential to the exercise of the latter jurisdiction that the magistrate should expressly declare on commencing the trial that he will proceed under the "summary trials" clauses of the Code.

[*R. v. Belmont*, 23 Can. Cr. Cas. 89, followed.]

3. CRIMINAL LAW (§ II A—49)—SUMMARY TRIAL—ACCUSED TO BE PERSONALLY PRESENT.

For the purposes of the summary trials clauses of the Criminal Code, the accused must be personally present; and it is not competent for a magistrate to proceed with a summary trial as for an indictable offence in the absence of the accused, although his counsel is present on his behalf prepared to make option under Code sec. 778 as to mode of trial and although the latter produces a written authority in that behalf signed and sworn to by the absent defendant.

[*R. v. Lepine*, 4 Can. Cr. Cas. 145; *Re Nunn*, 2 Can. Cr. Cas. 429; *R. v. Traynor*, 4 Can. Cr. Cas. 410, and *R. v. Sarault*, 9 Can. Cr. Cas. 448, referred to.]

4. STATUTES (§ II A—107) — INTERPRETATION — RECURRING PHRASES IN SAME STATUTE.

In the interpretation of the Criminal Code where the same words occur in different sections they should be given the same meaning unless a contrary intention appears.

5. CRIMINAL LAW (§ II B—45)—PROTECTION OF RIGHTS OF ACCUSED—FULL ANSWER AND DEFENCE.

The words "full answer and defence" used in Code secs. 715, 786 and 942, mean that the accused can invoke every means both in law and in fact to meet the charge; the word "answer" being specially applicable to a defence on the facts and the word "defence" applying both to matters of testimony and matters of law.

6. CRIMINAL LAW (§ II B—49)—SUMMARY TRIAL—FULL ANSWER AND DEFENCE.

The word "answer" as used in Code sec. 786 in the phrase "full answer and defence" has no special reference to the question to be put by the magistrate to the accused in certain cases on taking an election for or against summary trial, but applies alike to summary trial cases in which there is no right of election by the accused.

DECIDED: August 5, 1914.

CHARGES in three cases respectively of being found in a disorderly house, of keeping a disorderly house and of conspiring to defraud.

Alban Germain, for the accused; *N. K. Laflamme*, K.C., counsel.

D. A. Lafortune, K.C., for the Crown.

JUDGE SAINT CYR (*translated*):—On July 17, 1914, Adrien Lepage, a Montreal detective, laid a complaint against John E. Romer, Michael Farrell alias Summers, George Mitchell, John McCormick, Joseph Bossman, Frank Peter and Lawrence Stern, charging them with having been found in a disorderly house, namely, a house of ill-fame.

On the same day another complaint was laid against Edward Johnson, Harry Morrison and George Walker, for keeping a disorderly house.

Then a third complaint, directed against all of the accused above named, charged them with having conspired together to defraud the public by deceit, false representations and other fraudulent means.

All of the accused appeared before the Police Magistrate S. P. Leet Esquire, and after argument they gave bail each in the sum of \$700 on the charge of conspiracy to defraud. Bail was not demanded on the other two charges, probably because it was considered that the bail given in the one case was sufficient to ensure their appearance in the other two cases. So they were allowed to go on parole.

The first two cases were set for trial and the third was remanded for a preliminary hearing.

On July 29, 1914, the three cases came before me. On the call of their names, the following defendants were found to be absent: Johnson, Morrison, Farrell, Mitchell, McCormick, and Walker.

Mr. Alban Germain, their counsel, produced, on behalf of each absent defendant, an appearance in the following terms:—

“I, the undersigned, Ed. Johnson hereby declare that I choose and appoint as my attorney at law and representative Mr. Alban Germain, advocate, of the City and District of Montreal, to represent me in Court, in two cases bearing Nos. 3884 and 3684 of the records of the Police Court, and to make option for trial before the police magistrate and to enter, at the best of his knowledge, such plea that he will deem advisable.

“(Signed) ED. JOHNSON.

"Sworn before me at Montreal, District of Montreal, this 27th day of July, 1914.

"(Signed) THEO. BENARD,
"Deputy Clerk of the Peace."

At the request of counsel for the Crown default was entered against each of the absent defendants.

On behalf of the accused it was urged that such an appearance had the effect of substituting counsel in the place of the accused themselves, authorizing him to exercise the option provided for by article 778 of the Code thereby giving the magistrate jurisdiction to proceed in all three causes in the absence of the accused.

Accordingly counsel for the accused then made a formal statement that the accused elected to be tried summarily.

The first charge was laid under sec. 229 of the Code declaring liable all those who without lawful excuse are found in a disorderly house. All breaches of this section are punishable by summary conviction.

Article 718 authorizes a justice of the peace to proceed to a summary conviction in the absence of the accused, and article 720 expressly provides that the appearance of the accused by counsel is sufficient. This has been frequently decided by our Courts: particularly in *Denault v. Robida*, 8 Can. Cr. Cas. 501; *Ex parte Doherty*, 1 Can. Cr. Cas. 84; *Proctor v. Parker*, 3 Can. Cr. Cas. 37. It has since been decided that counsel could, in a summary conviction matter plead guilty for his client: *Rex v. McDonald*, 8 Can. Cr. Cas. 348. Two precedents from the English King's Bench are cited: *Rex v. Thompson*, 100 L.T. 970, and *Rex v. Montgomery*, 102 L.T. 325. Referring to the judgments in those cases it appears that both the words and the punctuation of the English law are identical with our articles 715 and 786. Our criminal law comes to us from the English law, and I am of opinion that we ought *in pari materia* to follow the jurisprudence of the tribunals in England. The above cited judgments were rendered under the English Summary Convictions Act the provisions of which correspond with those of our summary convictions statute. It is therefore easy to reach the con-

clusion that, in this first cause, the absence of certain of the accused does not matter, and that the magistrate has jurisdiction over them and can acquit or convict in their absence.

In the other two cases, it is a question of procedure. The law does not place on a footing of equality all offence, and although they may be punishable by indictment, there is another mode of procedure under Part XVI. of the Criminal Code.

Article 773 specifies a number of offences which the law considers more serious, among which is that of keeping a disorderly house.

Generally, the jurisdiction conferred by this Part of the Code depends on the consent of the accused, but it is not so for an offence of this kind, since article 774 gives in this case absolute summary jurisdiction to the magistrate.

How is this jurisdiction to be exercised? I cannot answer this question better than by citing the judgment of Gervais, J., in *Rex v. Belmont*, 23 Can. Cr. Cas. 89:—

“The accused has no choice between a summary conviction trial or a summary trial. The option, if I may be allowed to call it so, belongs to the Crown or to the magistrate, but the magistrate, who may use his right to exercise an absolute jurisdiction under articles 773 and 774 Cr. Code if he wishes, *must so declare, in so many words.*”

Has such declaration been made in this case with the formalities intended by the law? The record shews the contrary.

In 1909, article 777 of the Criminal Code was amended. The effect of the amendment was to give a police magistrate summary jurisdiction over all criminal offences which could be tried by the Court of Sessions of the Peace, under articles 582 and 583 of the Code.

Where the case is one of limited jurisdiction to make a summary conviction there is no question that the magistrate cannot impose the same punishment as that to which the accused would have been liable had he been tried before the Court of Sessions of the Peace.

Several conditions are essential to the exercise of summary trial jurisdiction (art. 778). There is necessary, first and above

all, a statement by the magistrate to the effect that he proposes to proceed in a summary manner: *Rex v. Belmont*, 23 Can. Cr. Cas. 89. The magistrate ought then to explain to the accused the substance of the charge. He ought, in the words of the statute, to ask the accused whether he consents to be tried summarily: *R. v. Harris*, 18 Can. Cr. Cas. 392. The accused is free to consent or not to consent to be tried and ought to make a statement accordingly. And it is only after each and all of these formalities have been complied with that the magistrate can proceed with the hearing. Even then article 784 provides that the magistrate at any time up to the prisoner presenting his defence may determine not to hear the case in this way.

The third charge falls under article 777. The preliminary hearing had been fixed for July 29. Counsel for the accused stated, as well in the name of the accused present as those not personally appearing, that they desired a summary trial and urged that they had the right to elect under article 786 which reads as follows:—

“786. In every case of summary proceedings under this part, the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or solicitor.”

It is urged that the word “answer” ought, in this article, to be interpreted as being the answer made by the accused to the magistrate when the latter asks him whether he consents to be tried summarily. It cannot, it is urged, be supposed that entirely superfluous words are used in the statute, and the word “answer” is not synonymous with the word “defence.”

The French version of the Code, however, translates the words “a full answer and defence” by the words “a full and entire defence.” It is true that in our interpretation of the Criminal Code we ought to favour the English version. But we find the same words in secs. 942 and 715 of the Code.

One cannot in the latter sections give to the word “answer” the meaning suggested by counsel for the accused, because the accused is not similarly called upon in the cases to which they apply a statement. The sections of a statute assist one another

upon their interpretation and every time that the same words recur in a statute they have the same meaning unless a manifestly contrary meaning is intended. As to this, the Code does not indicate a contrary intention.

Again, in the English law (Black's Law Dictionary) the word "answer" means a defence on the facts in the proceeding, the word "defence" is more general and includes everything both of fact and law that serves to defeat the action. When our Code uses the words "a full answer and defence" it means that the accused can invoke every means both in law and fact to meet the charge, and the French version interprets precisely the intention of the legislature when it uses the words "a full and entire defence."

Moreover, the word "answer" as found in this sec. 786 is not applicable to the procedure provided by article 778.

The keeping of a disorderly house and the conspiracy to defraud are crimes and hence punishable by way of indictment, and it is the first duty of the magistrate to proceed to the preliminary hearing under Part XIV. of the Criminal Code. A conviction precedent to the jurisdiction of a magistrate at such preliminary hearing is the presence of the accused (articles 668, 681, 682, 684). This presence of the accused at the preliminary hearing is so important that frequently our Courts have set aside indictments because certain steps in the proceedings had been taken in the absence of the accused from the preliminary hearing: *R. v. Lepine*, 4 Can. Cr. Cas. 145; *Re Nunn*, 2 Can. Cr. Cas. 429; *R. v. Traynor*, 4 Can. Cr. Cas. 410; *R. v. Sarault*, 9 Can. Cr. Cas. 448.

The presence of the accused is required throughout the preliminary hearing and such hearing can only terminate in the manner prescribed by law: that is to say, by the release of the prisoner or his remand to the assizes, by following the provisions of article 778 as already pointed out. It is only when the accused is at his preliminary hearing and when all the formalities prescribed by this article have been complied with that his summary trial begins. The first step, under article 778, is in a sense an incident of the preliminary hearing. The accused

being before a magistrate under article 668, the latter should proceed to a preliminary hearing, but he may declare that he proposes to proceed with a summary trial.

Inasmuch as this declaration was not made, the accused cannot escape any of the requirements of the law as to preliminary hearings, in other words he must be present.

It is before the accused, present for his preliminary hearing, that the magistrate should declare that he proposes to proceed summarily, it is to the accused that he should explain the substance of the charge, and it is the accused himself who ought to give his consent. Otherwise the magistrate can acquire no jurisdiction of summary trial over him.

This is what sec. 27, par. 1, of 42-43 Vict. (Imperial Statute) declares in plain words:—

“The procedure shall, until the Court assumes the power to deal with such offence summarily, be the same in all respects as if the offence were to be dealt with throughout as an indictable offence.”

It is thus that, in my opinion, we should interpret article 798 of our Code.

In these two causes the accused should have been personally present on July 29, 1914, for their preliminary hearing on the charges laid against them. Certain of them have not been present as so required, and thereby they have made default under their bail which default has been properly entered against them.

Under the circumstances, I now adjourn the two preliminary hearings to August 11, instant, at 10 a.m. to the enquête Court in the Court House at Montreal when the accused must appear to be further dealt with according to law.

Ruling accordingly.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE GUERIN, J.

REX v. GUAY.**1. CRIMINAL LAW (§ II B—49)—SPEEDY TRIAL WITHOUT JURY—CHANGING OPTION—CR. CODE SEC. 826.**

If the accused has regularly consented to a "speedy trial" without a jury under Part XVIII. of the Code, he has no right afterwards to change his option by re-electing for a jury trial.

[*R. v. Keefer*, 5 Can. Cr. Cas. 132, referred to; and see *R. v. Hebert*, 10 Can. Cr. Cas. 290.]

2. EVIDENCE (§ IV E—410)—RECORD OF COURT HOLDING SPEEDY TRIAL UNDER CRIMINAL CODE—RECITAL OF FACTS AFFIRMING JURISDICTION.

If the record of a County or district Judge's Criminal Court (or in Quebec a Judge of Sessions or district magistrate) on a prosecution under the speedy trials clauses (Part XVIII. of the Cr. Code) produced on a habeas corpus motion in pursuance of an ancillary writ of certiorari contains the recital of facts requisite to confer jurisdiction, it is conclusive and cannot be contradicted by extrinsic evidence, the proceedings of such Court under Cr. Code sec. 834 having to be considered as those of a Court of record.

[*Re Sproule*, 12 Can. S.C.R. 140, followed; *R. v. Murray*, 1 Can. Cr. Cas. 452, and *Ex parte Goldsberry*, 10 Can. Cr. Cas. 392, referred to.]

3. CRIMINAL LAW (§ II B—49)—SPEEDY TRIALS CLAUSES—OPTION OF NON-JURY TRIAL—CR. CODE SEC. 826.

An election of speedy trial without a jury under Part XVIII. of the Cr. Code must be a general one so as to include any Judge or official who may legally preside under Cr. Code sec. 823, and must not be limited by making it a consent to be tried only by the particular Judge before whom the accused is arraigned.

[*R. v. McDougall*, 8 Can. Cr. Cas. 234; *R. v. Stewart*, 15 Can. Cr. Cas. 331, referred to.]

DECIDED: September 11, 1914.

PETITION for discharge on habeas corpus brought by the prisoner Arthur Guay against the Governor of the Penitentiary of St. Vincent de Paul as respondent to the writ. The habeas corpus was supported by a writ of certiorari in aid to which the magistrate was respondent.

The writ of habeas corpus and the writ of certiorari in aid were ordered to be quashed and the prisoner remanded.

MONTREAL, September 11, 1914.

GUERIN, J.:—Petitioner is a prisoner undergoing a sentence of two years' detention in the Penitentiary of St. Vincent de

Paul. He has been brought here on a writ of habeas corpus supported by an ancillary writ of certiorari, the merits of which are now both submitted.

On a plea of guilty, his case was disposed of by a speedy trial held at Sherbrooke under the presidency of the District Magistrate of the District of St. Francis. Sentence was pronounced on the 14th April, 1914, on a conviction of housebreaking and of theft.

The main grounds of the petition are: that it does not appear in any way that petitioner chose a speedy trial, and that he gave no such notice to the sheriff of the district; that, on the 14th April, 1914, he made a motion stating that if an entry had been made of a plea of *guilty* and an option for a speedy trial, this has been the result of a mistake; that notwithstanding this, the Judge sentenced him, refusing to allow him to have a trial by jury; that it does not appear in any way that petitioner ever pleaded to the accusation when the speedy trial was had, nor that he was arraigned; that, although the speedy trial took place on the 9th April, 1914, the whole *proces verbal*, or record of trial, was made up on the 14th April; that none of the procedure regulating speedy trials has been followed; that the failure by the Judge to follow such procedure deprived him of the qualification and jurisdiction to try this case.

A number of other reasons are also given and affidavits have been produced in support thereof. They are all extraneous, however, of the record of the trial as submitted by the Judge's return upon the ancillary writ of certiorari, and under the authority of *Re Sproule*, 12 Can. S.C.R. 140, they should not be considered upon the merits of the writ of habeas corpus.

It is urged by the petitioner that such an order be made as to law and justice may appertain.

REASONS FOR THE DECISION.

1. *Re-election for trial by jury.*

If, under 825 Cr. Code, the prisoner has regularly consented to have his case disposed of by speedy trial before a Judge without a jury, he cannot change his option and obtain a jury trial.

The Criminal Code does not provide for such a request, the Judge having no power to grant it, and no discretion, therefore, to exercise. The rule is just the opposite, when a prisoner, having elected to be tried by a jury, desires to re-elect for a speedy trial without a jury. Special provision is made for this under 824 Cr. Code. The reason is obvious; the long delays which oft-times elapse between the committal of the accused and the summoning of the jury might entail great hardship, and the Crown is equally interested in reducing the public expenses which a jury trial entails. Vide *R. v. Keefer*, 5 Can. Cr. Cas. 132.

2. Change of Plea.

In the District of Montreal, it is customary to allow the accused to change a plea of *guilty* to a plea of *not guilty* at any time before he is sentenced. This custom prevails, also, in England.

Vide note in *R. v. Sell*, 9 Carrington and Payne 348. Without the fact of sentence having been passed, it would have been the ordinary case of a prisoner being allowed to retract his plea, in which there is never any difficulty.

Vide also *R. v. Clouter & Heath*, 8 Cox C.C. 227. On a trial for forgery against two prisoners, one of them, after the opening speech for the prosecution, asked to be allowed to withdraw his plea of *not guilty* and to plead *guilty*. This was done and the plea of *guilty* recorded. He was then examined as a witness on the part of the prosecution against his co-defendant, and in the course of such examination, swore that he had no knowledge of the instrument in question being forged. Upon this he was allowed to withdraw his plea of *guilty* and to plead *not guilty*, the jury withdrawing their verdict. The trial of the other prisoner was then proceeded with, and on his acquittal, the one who had withdrawn his plea was put upon his trial.

Vide also *R. v. Burke*, 24 Ont. R. 64.

Although this is the custom generally followed, it does not mean that there are no exceptions and that the discretion of the Judge is abrogated. Vide *R. v. Brown*, 17 L.J.M.C. 145. In this case, it was held that it is purely for the discretion of the Judge

at the trial whether a plea may be withdrawn or not; and the exercise of such discretion cannot be reviewed on a case reserved. Lord Denman, C.J., observed: "There is no case in which the discretion of the Judge upon this point has been overruled by us."

3. *Jurisdiction of Trial Judge.*

It appears from the record that in the month of April, 1914, a warrant issued against petitioner on the 7th at Sherbrooke, that on the 8th he was arrested at the township of Wotten between 4 and 5 p.m., that he was brought back a distance of 64 miles to Sherbrooke, and that on the 9th he appeared before the district magistrate, who committed him for trial at the next term of the Court of King's Bench on the charge of shop-breaking and theft, and issued his precept to all or any of the constables or other peace officers in the District of St. Francis, to convey the prisoner to the common gaol at Sherbrooke, and to the keeper of said gaol to receive the prisoner and keep him until thence delivered by due course of law. Under 826 Cr. Code, "every sheriff shall within twenty-four hours after the prisoner charged as aforesaid, is committed to gaol for trial, notify the Judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such Judge shall cause the prisoner to be brought before him."

It does not appear from the record that this formality was complied with. The prisoner undefended appeared again before the district magistrate on the day of his committal to the King's Bench, underwent a speedy trial, pleaded guilty and was convicted. The absence of the sheriff's notification in writing would indicate that petitioner did not pass through the hands of the sheriff at all, and consequently was never in gaol, where he should have been placed in obedience to the committal.

It has been held by the full Bench of the Supreme Court of Saskatchewan that the words "committed to gaol for trial" refer to the actual incarceration of the accused in gaol for the purpose of detention in custody until tried, and not a temporary detention elsewhere, and that 24 hours must elapse during which

the prisoner must be so detained *de facto* in gaol, before the sheriff may give his written notification to the Judge and the prisoner be brought before the Court for a speedy trial. *R. v. Tetreault*, 17 Can. Cr. Cas. 259.

In view of the application made by the petitioner to be allowed to withdraw his plea of *guilty*, it is apparent that these 24 hours would have been precious to him to obtain counsel and prepare his defence.

Moreover, the record does not shew any entry on the 9th April of the prisoner's consent to such speedy trial. This was not in accord with 825(2) Cr. Code, "and entry shall be made of such consent at the time the same is given."

Before this entry was made, the prisoner, through his counsel, formally moved to be allowed a trial by jury, which was rejected; the entry of prisoner's consent on the 9th was made on the 14th April.

The record of trial and conviction of the 14th April, states that the prisoner being committed for trial, having been brought before him, the District Magistrate, on the 9th April, 1914, and the offence having been read over to the prisoner, "and being told that he had the option forthwith of being tried before a Judge without the intervention of a jury, or to remain in custody or under bail as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction, and then asked by me if he *consented to be tried before me* without the intervention of a jury, consented to be so tried."

It has been held by eminent authority that an election for speedy trial under part xviii. of the Cr. Code (speedy trials), must be a general one, to be tried by a Judge having jurisdiction thereunder, and is invalid if restricted to trial only by the Judge before whom the arraignment takes place, 825 Cr. Code. Vide *R. v. McDougall*, 8 Can. Cr. Cas. 234, and the remarks of Mr. Justice Anglin, now of the Supreme Court of Canada. Vide *R. v. Stewart*, 15 Can. Cr. Cas. 331, a judgment of the Supreme Court of Nova Scotia, and the remarks of Townsend, C.J.: "The defendant, when he elected to be tried, was not submitting himself to the particular Judge, but to the County Court Judge's Criminal Court."

Under 823 Cr. Code, *Judge* means in Quebec in any district wherein there is no Judge of the Sessions of the Peace, but wherein there is a district magistrate, "such district magistrate or any Judge of the Sessions of the Peace."

This being the case in the District of St. Francis, if the interpretation given above is to prevail, the restricted election of the prisoner to be tried by the district magistrate only, would be defective and consequently fatal to his jurisdiction; the consent to a speedy trial, the plea of guilty and the sentence would be void.

The particular importance of such an objection in the present case is the fact that his plea of *guilty* at the trial had to be recorded after his consent to a speedy trial had been given, and there existed always the possibility in law that his case might be tried by any Judge of the Sessions of the Peace, instead of the district magistrate himself. Another exercising his discretion might have allowed the prisoner to withdraw his plea of *guilty*.

On the other hand, it is to be observed that the restricted consent to one person alone is the universal practice in the District of Montreal, although there are there more than one Judge of the Sessions of the Peace. To this practice, however, no one has taken exception; such negative evidence is by no means conclusive that such a custom is in accordance with 825 Cr. Code.

Whether, under the circumstances, the district magistrate acquired jurisdiction to try the prisoner is well open to controversy, but by law I have no power on a writ of habeas corpus to pronounce an effective judgment as to the jurisdiction of the trial Judge.

4. *Habeas Corpus.*

Under 834 Cr. Code the Judge sitting on any trial under part xviii., Cr. Code (speedy trials), for all the purposes thereof and the proceedings connected therewith or relating thereto, shall be a Court of Record, and the record in any such case shall be filed among the records of the Court over which the Judge presides as part of such records.

No constitutional question has been raised as to whether the

Parliament of Canada has the authority to create such a Court (section 101, British North America Act, 1867), rather than the legislature of the province which has exclusive authority as to the constitution, maintenance and organization of the Provincial Courts of Criminal Jurisdiction: sec. 91(27), and sec. 92(14), B.N.A. Act. In Ontario this Court has been formally constituted a Court of Record by the Provincial Legislature. R.S.O. 1914, ch. 61. This has not been done in Quebec. Vide article 3305, R.S.Q. In the absence of objection, however, the district magistrate thus presiding, *e.g.*, for the purpose of this case, is to be considered as a *Court of Record*.

Article 50 of the Code of Civil Procedure which enacts that all Courts within the province are subject to the superintending and reforming power, order and control of the Superior Court and of the Judges thereof, has no application to the present case, which is not a civil process. Procedure in criminal matters is regulated by the exclusive legislative authority of the Parliament of Canada. Sec. 91(27), British North America Act.

The judgment of a Court of Record cannot be enquired of on a writ of habeas corpus. Were it possible to do so, a single Judge of the Superior Court might assume to enquire of a conviction confirmed by the Court of Appeals as well as that of a Judge of speedy trials of indictable offences. To state such a possibility is its own refutation. Vide the following cases and the authorities therein cited: *In re Sproule*, 12 Can. S.C.R. 140; *In re O'Cain*, 13 R.L. 275 (this was the unanimous decision of the old Q.B.: Dorion, C.J., Monk, Ramsay, Sanborn & Tessier, JJ.); *Ex parte Plante*, 6 L.C. Rep. 106, Bowen, C.J.; *R. v. Murray*, 1 Can. Cr. Cas. 452, a judgment of the Court of Appeals of Ontario; *R. v. St. Denis*, 8 Ont. P.R. 16; *Ex parte Goldsberry*, 10 Can. Cr. Cas. 392, same case *sub nom.* *Goldsberry v. Bernatches*, 12 R. de J. (Larue, J.).

The writ of error having been abolished in Canada, petitioner's recourse to attack the conviction is by appeal under sections 1013 *et seq.* of the Cr. Code.

The proceedings in petitioner's case, not being susceptible of review under a writ of habeas corpus, I have only to examine

the warrant of commitment under which he is detained in the penitentiary. As I find it regular, the writ of habeas corpus and the ancillary writ of certiorari are quashed and the prothonotary is ordered forthwith to return the record held under the writ of certiorari to Henry Walter Mulvens, Esquire, District Magistrate of St. Francis, Sherbrooke, P.Q., as provided by section 1127 of the Criminal Code.

Prisoner remanded.

[SUPREME COURT OF ONTARIO.]

APPELLATE DIVISION.

BEFORE MEREDITH, C.J.O., MACLAREN, MAGEE, AND HODGINS, JJ.A.
AND MIDDLETON, J.

REX v. LOUIE CHONG.

1. ASSAULT (§ I—5) — INDECENT ASSAULT — INTENT OF AMBIGUOUS ACT
SHEWN BY WORDS SPOKEN—CR. CODE SEC. 292.

An act which otherwise would have no indecent import and would constitute a common assault only, may by reason of the surrounding circumstances and by words spoken at the time, constitute an indecent assault.

DECIDED: September 23, 1914.

CASE stated by the Police Magistrate for the Town of Sarnia, as follows:—

“The evidence disclosed that the prisoner, a Chinaman, followed the complainant, a respectable girl of fifteen, on her way home, at a late hour of the night, overtook her at a lonesome spot, seized hold of her against her will, and offered her money (\$5) to go with him for an immoral purpose, there being neither encouragement nor consent on her part. On the contrary, she made an outcry and threatened him with arrest, whereupon he left her. She ran home and immediately made complaint to her father of what had taken place. On these facts, so found by me on the evidence, was I right in finding the prisoner guilty of an indecent assault on a female?

September 22. The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and MIDDLETON, J.

J. H. Moss, K.C., for the prisoner, argued that there cannot

be a conviction for an indecent assault unless the act constituting the assault is in itself indecent in its nature; and that, on the evidence, there had been a miscarriage of justice in this case.

E. Bayly, K.C., for the Attorney-General, referred to *Rex v. Fontaine* (1914), 23 Can. Cr. Cas. 159, and argued that there was evidence of indecent suggestion, which was sufficient, taken in connection with the prisoner's act, to constitute the offence charged.

[MIDDLETON, J.:—Does not indecent assault mean an assault which has in it an element of indecency?]

Moss, in reply, argued that there must be a present indecent act in order to constitute the offence, and that the evidence did not disclose any such act.

September 23. The judgment of the Court was delivered by MIDDLETON, J.:—The point taken by Mr. Moss is, that there cannot be a conviction for indecent assault unless the act constituting the assault is in itself indecent in its nature. In this case all that was done by the prisoner was to take hold of the girl against her will. It is true that he offered her money and invited her to accompany him for an immoral purpose; but it is contended that this does not import any indecency into the laying on of the hand, which constituted the assault.

The section of the Criminal Code (292) provides for the punishment of every one who "indecently assaults any female."

It appears to me that an act in itself ambiguous may be interpreted by the surrounding circumstances and by words spoken at the time the act is committed. Mr. Moss conceded that if a man took hold of a woman and attempted to drag her into a brothel, that would constitute an indecent assault. It is in each case a question of fact whether the thing which was done, in the circumstances in which it was done, was done indecently. If it was, an indecent assault has been committed.

The magistrate has found, and, I think, rightly found, that this man, who took hold of the girl and invited her to go with him for an immoral purpose, did indecently assault her.

Conviction affirmed.

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE NEWLANDS, J.

REX v. McDERMOTT.

1. APPEAL (§ III E—91)—FROM SUMMARY CONVICTION—SERVICE OF NOTICE OF APPEAL—CR. CODE SEC. 750.

The period of ten days limited by Code sec. 750 (as amended 1909 and 1913) for filing a notice of appeal from a summary conviction does not apply to the service of notice on the respondent and the justices; it is sufficient that the service was made in sufficient time to perfect the appeal.

[Criticized in Annotation to this case.]

2. APPEAL (§ III D—86)—RECOGNIZANCE—SUMMARY CONVICTION AND FINE—CR. CODE SEC. 750.

Where a summary conviction directs payment of a fine and, in default of distress, imprisonment, the defendant's recognizance on an appeal therefrom under Cr. Code 750 need not cover the fine and costs, the imprisonment fixed in default of payment being sufficient security for that; the basis on which the amount of the recognizance should be fixed in such case is what the probable costs of the appeal would be.

[Criticized in Annotation to this case.]

DECIDED: September 18, 1914.

MOTION for a mandamus to justices of the peace to compel them to issue a distress warrant under a summary conviction on the ground that the defendant's attempted appeal had not been perfected.

The motion was refused.

D. B. McCurdy, for informant Dunnett.

A. Benson, for magistrates.

September 18, 1914.

NEWLANDS, J.:—On July 30, last, James J. McDermott was convicted of a breach of sec. 43, ch. 110, R.S.S. 1909, and fined \$50 and costs, \$12.50 to be levied by distress of his goods and chattels, and in default of distress, 30 days in Regina gaol with hard labour.

From this conviction McDermott appealed. The informant

now moves for a mandamus to compel the convicting justices to issue a distress warrant to collect the fine and costs imposed on the following grounds:—

(1) Because a notice of appeal was not served on the informant within ten days after the conviction order.

(2) Because McDermott did not enter into a recognizance in an amount to cover the fine and costs and an amount fixed by the justices to cover costs of an appeal.

Upon these two grounds the informant contends that the appeal has not been perfected and that there is therefore no appeal, and that it is the duty of the justices to collect the fine and costs by distress. The statute providing for appeal in such cases is sec. 750 of the Criminal Code as amended by ch. 9 of 1909, and ch. 13 of 1913.

As to the first objection, sec. 750 of the Code, sub-sec. (b), as amended by ch. 9 of 1909, provided that the notice of appeal should be served on the respondent or justice "within ten days after the conviction," but this sub-section was further amended by sec. 26 of ch. 13 of 1913, that the notice of appeal must be filed in the office of the Clerk of the Court appealed to within ten days after the conviction, "and by serving the respondent and the justices who tried the case each with a copy of such notice." The ten days mentioned in the section is not the time, therefore, in which the notice is to be served on the respondent, and it is not necessary for the purposes of this case for me to decide within what time such notice must be served. All I need to decide is that the notice was served on McDermott in sufficient time to perfect the appeal, and this is my opinion.

As to the second objection, sub-sec. (c) of sec. 750, as amended by the Act of 1909, provides for three cases:—

(1) Where the punishment adjudged is imprisonment.

(2) Where a fine is imposed, and in default of payment imprisonment.

(3) Where imprisonment is not directed.

In the first case, the accused is either to remain in custody or enter into a recognizance in form 51; in the second case, to remain in custody, enter into a recognizance in form 51, or de-

posit with the justices an amount sufficient to cover the amount adjudged to be paid, together with such further amount as the justices deem sufficient to cover the costs of the appeal, and in the third case, to enter into a recognizance in form 51 or make the deposit of money.

This case comes under the second class, and the accused had, therefore, three alternatives: (1) to remain in prison; (2) enter into a recognizance in form 51; or (3) deposit a sum of money. He selected the second alternative and entered into the recognizance in form 51. This recognizance is to be "conditioned personally to appear at the said Court and try such appeal and to abide the judgment of the Court thereupon and to pay such costs as are awarded by the Court."

As the recognizance in the second case is the same as in the first, it was apparently not the intention to make the recognizance cover the fine and costs, the imprisonment fixed in default of payment being sufficient security for that. The amount of money, therefore, for which the bond would be given would be a sum fixed by the justice to cover the costs of appeal, and as this was done in this case, the grounds upon which this application is made fail, and the application is therefore dismissed with costs.

Application dismissed with costs.

ANNOTATION—APPEAL (§ III E—91)—*Service of notice of appeal—Recognizance.*

The decision of Newlands, J., in *R. v. McDermott*, supra, is subject to adverse criticism on both points set out in the head-note. The motion for a mandamus seems not to have been the appropriate method of procedure and might have been dismissed on that ground which is not dealt with in the opinion handed down. The case dealt with the regularity of appeal proceedings on an appeal from a summary conviction. The notice of appeal had been duly filed and a recognizance taken by the convicting justices to an amount which they considered sufficient. The questions which were under discussion on the mandamus proceedings taken to compel the justices to ignore the attempted appeal as irregular were such as would ordinarily be raised by a motion to quash the appeal or by preliminary objection on the

ANNOTATION (*continued*)—APPEAL (§ III E—91) — *Service of notice of appeal—Recognizance.*

hearing of the appeal. A mandamus would lie only for error of the justices to whom it was to be directed and the first ground, viz., that copies of the filed notice of appeal had not been served in due time upon the informant and the justices, involved a question which belonged to the appellate tribunal to determine and not to the convicting magistrates. The motion for a mandamus could not be supported as a substitute for a motion to quash the appeal so far as service of the notice of appeal is concerned. It will be noted also that unless otherwise provided in any special Act the appeal in Saskatchewan under Code sec. 749 is to the nearest district Court not to the provincial Supreme Court. As to the alleged insufficiency of the recognizance, the second ground taken in the attack upon the appeal proceedings, it would be an extraordinary procedure to anticipate the regular course of raising objection to the regularity of the appeal before the appellate tribunal itself, by such a collateral attack as a mandamus to the justices, whether the defendant is or is not made a party to the proceedings. The exercise of mandamus powers might be appropriate at a later stage if the appeal taken to a Court of inferior jurisdiction were improperly quashed upon an erroneous ruling as to the sufficiency of the notice of appeal. *R. v. Trottier*, 14 D.L.R. 355, 22 Can. S.C.R. 102, 25 W.L.R. 663.

Upon the substantive question of the time for service of a notice of appeal it is submitted that it is a more reasonable construction of Code sec. 750 as amended 1913 to apply the ten days period both to the filing of the notice of appeal and to the service of copies thereof. Paragraph (b) of sec. 750 as enacted in 1909 provided that the appellant give notice of his intention to appeal by filing, etc., "and serving the respondent or the justice, etc., within ten days after the conviction complained of." The intention of the amendment of 1913 seems to have been to make service necessary on both the respondent and the justice, where before that amendment it was sufficient to serve the one or the other at the option of the appellant. The transposition of the words "in ten days, etc.," is an improvement in the form of the paragraph and the ten-day limitation still attaches to the service of the respondent and the justice, with a copy of the notice of appeal.

As to the other question of the recognizance, paragraph (c) of sec 750 as well as Code form 51 are explicit in including as the conditions of the bond not only that the appellant shall pro-

ANNOTATION (*continued*)—APPEAL (§ III E—91) — *Service of notice of appeal—Recognizance.*

secute his appeal but that he shall "abide the judgment of the Court thereupon," and pay costs awarded. The form is a general one so as to be applicable to the various circumstances of a summary conviction, and where the latter inflicts a fine, and after the appeal the fine still remains by virtue of the affirmance of the conviction, in terms of the justice's award or by the substitution of a new adjudication in the appellate Court, the words of the condition that the appellant "abide the judgment of the Court thereupon" seem particularly applicable to the payment of that fine. If more were needed to shew that the amount of the fine and costs as ordered in the justice's Court is to be covered by the recognizance and considered by the justice when he fixes the penal sum left blank in the statutory form, it is to be found in the alternative provision for a cash deposit. Whether or not imprisonment in default is directed, the defendant has the option, under paragraph (c) as re-enacted in 1909, to deposit with the justice "an amount sufficient to cover the sum so adjudged to be paid" (*i.e.*, the "penalty or sum of money adjudged to be paid" by the conviction or order appealed against) together with "such further amount as such justice deems sufficient to cover the costs of the appeal."

[SUPREME COURT OF ALBERTA.]

BEFORE HYNDMAN, J.

REX v. WILSON.

I. CONTINUANCE AND ADJOURNMENT (§ I—4)—CRIMINAL LAW — SUMMARY TRIAL BY MAGISTRATE—ADJOURNMENT *SINE DIE* FOR DELIBERATION.

Where the magistrate who had heard the evidence on a summary trial had adjourned to a fixed date for judgment but, being unable to then attend, another magistrate took his place and further adjourned the case *sine die*, the conviction recorded by the first magistrate at a later date when the accused was again brought before him is invalid, as any adjournment must be to a day certain.

[See *R. v. Morac*, 22 N.S.R. 298; *R. v. Quinn*, 2 Can. Cr. Cas. 153; *Plante v. Cliche*, 17 Can. Cr. Cas. 43, 38 Que. S.C. 542; *Cairns v. Choquet*, 3 Que. P.R. 25; *R. v. Smith*, 16 Can. Cr. Cas. 432; *Donahue v. Recorder's Court*, 18 Can. Cr. Cas. 182; *Ex parte Giberson* (No. 3), 10 Can. Cr. Cas. 355; *Dick v. The King*, 19 Can. Cr. Cas. 44.]

D: October 1, 1914.

tion by way of certiorari to quash a conviction on summary trial for retaining possession of stolen property knowing it to have been stolen (Cr. Code sec. 399).

The motion involved the validity of an adjournment *sine die* made after the conclusion of the testimony.

The conviction was quashed.

J. A. Clarke, for applicant.

L. T. Barclay, contra.

EDMONTON, October 1, 1914.

HYNDMAN, J.:—This is a motion in the nature of a certiorari to quash a conviction and order of commitment made by Geo. W. Massie, Esquire, Police Magistrate for the Province of Alberta, whereby Claude Wilson (the applicant) was sentenced to three months' imprisonment in the Fort Saskatchewan gaol "for that he, the said Wilson on or about the 22nd of August, 1914, at Edmonton, did unlawfully have in his possession certain stolen property, to wit, a gold watch and chain, he well knowing the same to be stolen."

The grounds of the motion are:—

1. That the finding of the police magistrate was not in accordance with the evidence or the weight of evidence.

2. That there was no evidence that any chain had been stolen by the said Claude Wilson at any time.

3. That there was no evidence that the said Claude Wilson knew that the said gold watch or chain had ever been stolen.

4. And upon the grounds that adjournment of the said proceedings against the said Claude Wilson on the 8th day of September were taken when the said Claude Wilson was not present, and that no other proceedings could thereafter be taken.

5. On the grounds that Robert Belcher, Police Magistrate, had no power to adjourn the said case on the 8th day of September or on the 9th day of September, and that when the said Robert Belcher adjourned the said case on the 8th of September, he did not adjourn the same to any definite date.

I do not think ground (1) can properly be considered on a motion of this character and on the argument counsel for applicant relied entirely on grounds 4 and 5.

The facts, so far as I can gather same from the return made

by the police magistrate and the affidavits filed are shortly, as follows: The information and complaint was sworn on August 31, 1914, before said Massie, P.M., and the accused was arraigned before him the same day and pleaded "not guilty." Accused was then remanded until Thursday, September 3, and on Thursday was again remanded until Friday, September 4, at 11 o'clock, a.m., when he consented to be tried summarily and the evidence was taken by said Massie who reserved judgment till Tuesday, "September 8th, at 10 a.m."

It appears that Mr. Massie did not attend Court on September 8, but that his place was occupied that day by R. Belcher, Esquire, a police magistrate for the province. The accused, although in custody, was not present in Court, but his solicitor, Mr. J. A. Clarke was present, so that if an adjournment had been made to a definite date there could be no objection to the personal absence of accused. The affidavit of Clarke is to the effect that Mr. Belcher adjourned the case, but that such adjournment was not to any definite date but "*sine die*." On the following day, September 9, accused was brought before Mr. Belcher and the case was further adjourned to the following day, the 10th, and on that occasion Mr. Massie was present, found accused guilty and sentenced him to three months' imprisonment to the provincial gaol at Fort Saskatchewan.

From the memoranda on the information and complaint it is impossible to say whether an adjournment was made from the 8th to the 9th. Following is a copy of the memoranda which is material:—

Reserved judgment to Tues. Sept. 8 -10 a.m.

G. W. M.

9.9.14.

Adjourned till 10 a.m. 10.9.14.

R.B. P.M.

The figures 9.9.14 might possibly have been intended to mean that on the 8th the case was adjourned to the 9th, or it may simply be the date on which the latter memo "adjourned till 10 a.m. 10.9.14" was made.

In view of the affidavits of the accused and Clarke to the effect that accused was not present on the 8th and that no de-

finite date was mentioned, and Mr. Clarke's statement being uncontradicted, I am inclined to the conclusion that the adjournment of the 8th was to no definite day.

If such was the case then the conviction cannot stand. The authorities are clear on the point that an adjournment by a magistrate (although after the hearing he might even adjourn for a longer period than eight days) must in any event be to a day certain and fixed and must be stated in the presence of the parties or their solicitors.

The conviction and order of commitment must, therefore, be quashed. There will be the usual order for protection, and no costs will be allowed.

Conviction quashed.

[SUPREME COURT OF ONTARIO.]

HIGH COURT DIVISION.

BEFORE LENNOX, J., IN CHAMBERS.

REX v. PEART.

1. SUMMARY CONVICTIONS (§ V—50)—AMENDING COMMITMENT—CR. CODE SEC. 1121.

A defective warrant of commitment following a summary conviction cannot be amended under Code sec. 1121 on a habeas corpus application if the conviction itself is also bad in law.

2. JUSTICE OF THE PEACE (§ II—6)—PROTECTION ORDER ON QUASHING WARRANT—CR. CODE SEC. 1131.

An order of protection to the magistrate cannot be made on the allowance of a writ of habeas corpus in respect of an invalid warrant of commitment where the prisoner is discharged *ex debito justitiæ* and there is no motion to quash the conviction or proceeding on which the warrant is based. (Cr. Code 1131.)

[*R. v. Lowery* (1908), 13 Can. Cr. Cas. 105, 15 O.L.R. 182, followed; *R. v. Nelson*, 15 Can. Cr. Cas. 10, 18 O.L.R. 484, referred to.]

DECIDED: October 13, 1914.

Motion by the defendant, upon the return of a writ of habeas corpus, for an order discharging the defendant from custody.

F. R. Blewett, K.C., for the defendant.

J. McC. Baird, for the Attorney-General.

LENNOX, J.:—The order will go for the discharge of George Peart from the common gaol of the county of Perth.

It is admitted that the offence, if any, of the prisoner was a common assault, an offence for which the Police Magistrate could at most commit him to gaol for two months. The warrant of commitment is for three months' imprisonment for "threatening," whatever that may mean. The warrant on its face is clearly illegal. The proceedings have been brought up, by certiorari, at the instance of the Attorney-General. If I am at liberty to make use of them—and the case of *Rex v. Nelson* (1909), 15 Can. Cr. Cas. 10, 18 O.L.R. 484, would rather indicate that I am not—they do not materially help the case for the Crown. There is no regular conviction. Great leniency may be proper in the case of a county magistrate, but the proceedings here are more informal and slovenly than I feel called upon to encourage in the case of a salaried official. The complaint does not disclose an assault, for the relative position of the parties is not alleged, and there is nothing to shew that the prisoner was at the time in a position—near enough—to execute his threat, or that he actually attempted to strike the complainant. This defence is not necessarily fatal, particularly if I were dealing with the question of quashing the conviction, for the complainant in his evidence swears, "He had a hammer in his hand and struck at me and I warded off the blow," and there is other evidence to the same effect. The prisoner denies any attempt to strike; and the question of fact was entirely a question for the magistrate. But there is nothing to shew whose evidence he accepted or acted upon. He goes back to the charge as it was laid, and as it is repeated in the heading of the evidence, and he says: "I adjudge the said George Peart guilty of the charge of threatening to strike Biet on the head with a hammer, and I order him to be committed to the common gaol" (where?) "for the period of three months without hard labour;" and the warrant of commitment is for "threatening" accordingly.

I do not propose to quash the conviction, if this amounts to a conviction.

I am asked to discharge the prisoner conditionally only, under sec. 1120 of the Criminal Code, as amended by 7 & 8 Edw. VII.

ch. 18, sec. 14. Speculation as to the meaning of this obscure section is set at rest by the Court of Appeal in *Rex v. Frejd* (1910), 18 Can. Cr. Cas. 10, 22 O.L.R. 566. The prisoner now applying is not "charged with an indictable offence;" the magistrate assumed to exercise summary jurisdiction; and the offence, if any, disclosed was one in which he could exercise summary jurisdiction. But there would be no justice in any case in further detaining the prisoner, as already he has served the two months for which at most the magistrate could lawfully commit him, or within a day or two of two months. In the view I take, it is not necessary to consider the effect of the complaint that the prisoner was not afforded an opportunity to elect as to the mode of trial.

Neither can I amend under sec. 1121 of the Criminal Code. I cannot find that "there is a good and valid conviction" in law to sustain the warrant of commitment—assuming that I am at liberty to give effect to the proceedings produced in Court.

I am asked to make an order protecting the magistrate. I am discharging the prisoner *ex debito justitiæ*. I have no power in such a case to make an order for protection of the magistrate: *Rex v. Lowery* (1908), 13 Can. Cr. Cas. 105, 15 O.L.R. 182; and I am not sure that I would make the order if I had the power. See *Rex v. Nelson*, 15 Can. Cr. Cas. 10, 18 O.L.R. 484. It is not too much to expect that a man who applies for or accepts a position as a salaried magistrate will bring to the discharge of his important functions at least a fundamental knowledge of the provisions of the Criminal Code and the outstanding principles governing the administration of justice; and the evidence here if it is to be looked at would suggest to me the wisdom of an inquiry as to sanity rather than an immediate conviction. Costs were not referred to, and I make no order.

Prisoner discharged.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RUSSELL, J.

REX v. OXLEY.

1. HOMICIDE (§ III A—22) — ACCIDENTAL SHOOTING — HUNTING IN CLOSE SEASON.

The criminal liability of the accused, who while hunting with his friend accidentally shot the latter while aiming at what he believed to be a moose, is not sufficiently enhanced by the circumstance that the hunting took place in the close season (the latter infringement being merely *malum prohibitum* and not *malum in se*) to warrant a conviction for manslaughter on that ground alone, and the jury may be directed to acquit unless they find that the accused was criminally negligent in discharging the gun without exercising due care and precaution.

DECIDED: October 15, 1914.

TRIAL of indictment for manslaughter.

The defendant and a friend went into the woods on a Saturday afternoon during the close season, hunting for moose. On Sunday morning they separated and shortly afterwards the defendant fired on what he believed to be a moose, but which proved to be his comrade, who was killed by the shot. It was contended for the defendant that there was no crime inasmuch as hunting moose on Sunday during the close season was not *malum in se* but merely *malum quia prohibitum*, and the following illustration from Foster's Crown Cases was referred to:—

A shooteth at the poultry of B and by accident killeth a man. If his intention was to steal the poultry which must be collected from circumstances it will be murder by reason of that felonious intent, but if it was done wantonly and without that intention it will be barely manslaughter.

The rule I have laid down supposeth that an act from which death ensued was *malum in se*, for if it was barely *malum prohibitum* as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose the case of a person so offending will fall under the same rule as that of a qualified man for the statutes pro-

hibiting the destruction of the game under certain penalties will not in a question of this kind enhance the accident beyond its intrinsic moment.

James A. Hanway, for the Crown.

F. L. Milner, K.C., for the defendant.

RUSSELL, J., said that the law was either in favour of the prisoner or that there was so much doubt about it that he would direct the jury not to convict.

The case then proceeded on the theory that the defendant had been criminally negligent in discharging the gun.

Verdict not guilty.

[SUPREME COURT OF ONTARIO.]

HIGH COURT DIVISION.

BEFORE KELLY, J., IN CHAMBERS.

REX v. STECKLEY.

1. CERTIORARI (§ 1 A—3) — SUMMARY TRIAL FOR INDICTABLE OFFENCE — CROWN'S ADMISSION.

Where it appears that a plea of guilty to a charge of kidnapping was entered by the accused without the advice of counsel and without due appreciation of the character of the charge as distinct from the offence of abduction, a conviction for kidnapping made on summary trial by a magistrate without taking any testimony, may be quashed on certiorari by a Court of superior criminal jurisdiction on an admission by the Crown that the offence, if any, was not kidnapping but abduction, but with leave to institute fresh proceedings for the latter charge.

DECIDED: October 19, 1914.

Motion by the defendants, Arthur Steckley and Gordon Steckley, for an order quashing their conviction by a Police Magistrate for kidnapping.

Shirley Denison, K.C., for the defendants.

Edward Bayly, K.C., for the Attorney-General.

KELLY, J.:—The accused men, father and son, were charged that on the 14th July, 1914, they “did kidnap a girl under age named Blanche Steckley.” The girl is the daughter of the elder of the two men and the sister of the younger. The whole proceedings—the information, the issue of the warrant, the arrest, the trial, and the conviction—took place on the day on which the alleged offence was said to have been committed.

The papers returned contain a record by the magistrate that both defendants elected to be tried summarily and pleaded “guilty.” On the motion affidavits of both defendants were submitted denying this election and plea of “guilty;” and a further affidavit of the magistrate, confirming his record in that respect, was filed. I do not take these affidavits into consideration in disposing of the application. The charge is a grave one, for which the accused, if guilty, would be liable to a serious penalty. No evidence was taken before the magistrate from which one may judge of the nature of the defendants’ acts which are said to have constituted the offence charged; but it is admitted by counsel for the Crown that whatever offence the accused may have been guilty of, it was not kidnapping; he contends that they are guilty of another and different offence, that of abduction.

Having regard to the expedition with which the proceedings were taken and carried to completion—to say the least of it, they were hasty—and having in mind the gravity of the offence charged, and the Crown’s admission, it is not easy to believe that these men, unrepresented by counsel, and it may be, so far as the record shews, without any advice, could have appreciated the character of the charge preferred against them when they pleaded “guilty,” if they did so plead. To uphold a conviction under such circumstances, and thus leave the accused subject to the consequences of such conviction, would be contrary to what a sense of justice demands. For my part I am not prepared to take the responsibility of following such a course.

The conviction is quashed, but without costs; and there will be an order of protection to the magistrate; leaving it to the prosecution to proceed on such other charge, if any, as may be advised.

Conviction quashed.

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE NEWLANDS, J., IN CHAMBERS.

REX v. KOLENCZUK.

REX v. CHUPAK.

1. VAGRANCY (§ 1—2) — ESSENTIALS OF OFFENCE — WANDERER WITHOUT MEANS OF SUBSISTENCE.

A commitment under Cr. Code sec. 238 for vagrancy does not disclose an offence where it recites that the prisoner was a "loose, idle person found wandering abroad and not giving a good account of himself, thereby being a vagrant," unless it is also recited that he had no visible means of subsistence, and a discharge will be ordered on habeas corpus where the conviction on which the commitment was based was similarly defective.

[Compare *R. v. Hayes*, 6 Can. Cr. Cas. 357, 5 O.L.R. 198; *R. v. Young*, 5 O.R. 184 (a); *Re Effie Brady*, 21 Can. Cr. Cas. 123, 10 D.L.R. 424.]

DECIDED: October 23, 1914.

MOTION for a writ of habeas corpus with a view to the discharge of the accused under a summary conviction and commitment thereunder for vagrancy.

The questions involved were whether there was a sufficient description of the offence in either the warrant of commitment or in the formal conviction.

The prisoner was discharged.

MacKinnon, for the accused.

Campson, for the Attorney-General's Department.

NEWLANDS, J.:—Section 238 of the Criminal Code provides that every one is a loose, idle, or disorderly person or vagrant who

(a) not having any visible means of subsistence, is found wandering abroad . . . and not giving a good account of himself, . . .

It is the not having any visible means of subsistence, is found wandering abroad and not giving a good account of himself that makes him a loose, idle or disorderly person or a vagrant. There-

fore the commitment in these cases which state that the prisoner was a loose, idle person found wandering abroad and not giving a good account of himself thereby being a vagrant does not describe any offence under the above section.

The only description of the offence in this conviction is that the prisoner was found wandering abroad and did not give a good account of himself, the being a loose, idle person or vagrant is what the statute says he is when he does one of the things forbidden by sub-secs. (a) and (b) of sec. 238; and as persons are not forbidden to wander abroad unless they have no visible means of subsistence the commitment is bad as not describing any offence known to the law.

I direct an order to be drawn up for the prisoner's discharge without waiting for the return of a writ of habeas corpus. No costs.

Prisoner discharged.

[SUPREME COURT OF ONTARIO.]

HIGH COURT DIVISION.

BEFORE MEREDITH, C.J.C.P., IN CHAMBERS.

REX v. RAE.

1. BAIL AND RECOGNIZANCE (§ 1—4)—CAPITAL OFFENCE—MURDER CHARGE POSTPONED BY CROWN.

That the prisoner against whom a true bill had been found for murder had been ready for trial at the Assizes and that the trial had been postponed at the request of the Crown will not constitute sufficient ground for concurrently making an order to admit to bail; *semble*, the prisoner's recourse is to apply on the first day of the following Assize to be brought to trial, under the Habeas Corpus Act, 31 Car. 2, ch. 2, and in default that he be granted bail.

[*R. v. Keeler* (1877), 7 P.R. (Ont.) 117, and *R. v. Mullady* (1868), 4 P.R. (Ont.) 314, followed; *R. v. Chapman*, 8 C. & P. 558, considered.]

DECIDED: October 30, 1914.

MOTION on behalf of a prisoner, against whom a true bill for murder had been found, for bail.

October 6 and 25. The motion was heard by MEREDITH, C.J. C.P., at the Guelph assizes and in Chambers at Toronto.

C. L. Dunbar, for the prisoner.

Edmund Meredith, K.C., and *Edward Bayly*, K.C., for the Crown.

October 30. MEREDITH, C.J.C.P.:—The inclination of my judgment, when this application was first made, was, and, but for the decided cases, of the same character as this case, would still be, to let the prisoner to bail, if bail of a very substantial character were given.

As I understand the subject, the single proper purpose of detaining an accused person in close custody is to insure his trial in due course; if that were as certain without as with imprisonment there would be no good reason for any imprisonment until after a conviction.

A person in close custody must be sometimes more or less hampered in preparing for his trial; the advantage is with the prosecution.

And, except to insure the accused person's presence for trial, there would be an anomaly in making a prisoner, before trial, of one who, in the eyes of the law, is deemed innocent until tried and convicted.

But this theoretical anomaly in the criminal law is a practical necessity: without imprisonment until trial a vast number of accused, and of guilty, persons would try to cheat justice by evading a trial.

So that in all applications for bail, resting in the discretion of a Court or of a judicial officer, in criminal cases, the paramount question should be, whether the presence of the accused person, for trial in due course, would be assured if the application were granted: if that cannot be made sure by other means, then there is no other proper course but detention in close custody.

In determining whether a trial in due course would ensue without such detention, several circumstances must be taken into consideration, such as: the nature of the offence charged; the extent of the punishment that might follow upon a conviction; the nature of the evidence likely to be adduced at the trial, and

so the probability of conviction or of acquittal; the character of the accused person, and of the ties, if any, which are likely to bind him to remain in the country and stand his trial; and the speed or sloth in which the prosecution is being carried on; as well as any other circumstances likely to affect the accused person's fear of conviction or confidence of acquittal: and his chances in an attempt to escape from trial.

The statute-law, in favour of a prisoner, bearing upon this subject, must also of course be borne in mind: I refer especially to the provisions contained in sec. 6 of the Habeas Corpus Act—31 Car. II. ch. 2 (R.S.O. 1897, vol. 3, p. xxxix.); and sec. 699 of the Criminal Code, R.S.C. 1906, ch. 146.

In cases of murder, and the more so after a preliminary investigation, by a judicial officer, an investigation which ought to be thorough, and at which the accused person has the right to give any such relevant evidence as he chooses, and after a commitment for trial as the result of that investigation—and still more so in cases such as this, in which a true bill has been found also—the rule is, and should be, that the accused person should not be admitted to bail: the temptation to escape from a trial in such a case being too great to leave much, if any, great hope that bail to any amount would overcome it. But there well may be some exceptions to that rule, including the statutory one contained in the Habeas Corpus Act: see *Regina v. Bowen* (1840), 9 C. & P. 509.

And, having regard to all the circumstances of this case, including of course the fact that the prisoner was ready for and desired trial at the last Wellington assizes, the inclination of my judgment was, as I have said, to consider this case an exception to the rule; but I am now obliged to say that that inclination does not seem to run quite parallel with the decided cases; and it is a thing of great importance that there should be uniformity of practice in this respect; that the same rule should be applied to all accused persons in the like manner; that there should be no reason given for any one to think that it might depend upon the particular Judge applied to whether such an application as this failed or succeeded.

In the case of *Regina v. Chapman* (1838), 8 C. & P. 558, the Chief Baron, Lord Abinger, at an Oxford assizes in the year 1838, seems to have said that in no case of murder, after bill found, should the prisoner be admitted to bail. And that too was a case like this, in which, at the instance of the Crown, the trial had been put off until the next assizes. But I cannot think any such hard and fast rule was intended to be laid down. I treat the language of the learned Chief Baron as having been inspired by the facts of the case he was considering, and to be applicable to cases of like circumstances. I should add too that that case was made stronger for the applicant, because bail to any amount that might be required was offered.

In the cases in the Courts of this Province, of *Regina v. Keeler* (1877), 7 P.R. 117, and *Regina v. Mullady* (1868), 4 P. R. 314, in each of which the question of granting or refusing the application was treated not as subject to any hard and fast rule, but as being in the judicial discretion of the Court, there were circumstances so much like those of this case that I cannot doubt that, had this very case come before either of the Chief Judges who decided those cases, the application would have been refused, as it was in each of the cases I have mentioned.

In the earlier case, no bill had been found, and one assizes had passed without a bill having been preferred; and these observations of the learned Judge who decided that case are quite applicable to this case, even if Mr. Dunbar's contention, that, as far as it has been disclosed, the case for the Crown is not a strong one, were true: "I am compelled to say that, after going through the depositions, I think they contain a strong *primâ facie* case, *though one which, if there be additional evidence, I think ought not to have been tried without it, or until proper efforts to procure it have been made and have failed.*" I have been obliged to quote the whole sentence in order to make the latter part, to which I refer, and have underlined, intelligible.

In the later case, a true bill had been found, and one assizes had passed without bringing the prisoners to trial: and the concluding words of the learned Judge in refusing the application in that case are applicable to this case; they are: "The charge

against them is murder. The sentence, if guilty, is death. There is evidence which would"—I would say might—"justify a finding of guilty. I do not say that a jury ought on the evidence to find any one of the prisoners guilty. I only say it is competent for a jury to do so. Looking at the serious character of the charge, the dreadful sentence that must follow a conviction; the fact that there is evidence against each of the prisoners: the fact that only one assize has elapsed without a trial, and that a true bill was found at that assize, I think that it would be more prudent for me to abstain from the exercise of, than to exercise, the power which I possess of bailing the prisoners. I leave them, if necessary, to their remedy under the Habeas Corpus Act."

The strictness of the practice against admitting to bail in murder cases under ordinary circumstances, especially after bill found, is maintained through all the cases, that I have read, in this country, in England, in Ireland, and in the United States of America; and, though it may be that, having regard to the growing wider range and efficiency of the extradition laws generally, and other circumstances making escape from justice more difficult, as well as growing greater regard for the liberty of the subject not convicted of crime, that strictness may be somewhat mitigated in time, the cases as they stand compel me to refuse this application now; but that will not prevent a further application being made and being successful, if other circumstances arise favouring it sufficiently to admit the prisoner to bail without disregarding the decided cases.

Bail refused.

[SUPREME COURT OF ALBERTA.]

BEFORE SCOTT, STUART, BECK, AND SIMMONS, JJ.

REX v. CARDELL.1. **PROCURING (§ I—5)—PROSTITUTION—CR. CODE 216.**

The word "prostitution" in Cr. Code sec. 216 (amendment of 1913) means promiscuous sexual intercourse with men, and is negatived where the magistrate finds that the intent of the accused man was only that the woman should become his mistress and not to bring about sexual connection between the woman and other men.

DECIDED: October 21, 1914.

CASE reserved in respect of a conviction for procuring under Cr. Code sec. 216.

A. H. Clarke, K.C., and *P. J. Bergeron*, for the appellant.
James Short, K.C., for the Crown, respondent.

The judgment of the Court was delivered by

STUART, J.:—In convicting the accused the police magistrate made the following definite finding of fact: "Your whole purpose throughout the whole thing was for her to act as your mistress." In view of this finding of fact it is impossible for the Court to consider the question whether there was any evidence to shew an intent on the part of the accused to bring about sexual connection between the woman and other men. The words quoted expressly negative that suggestion and the Court cannot go behind that.

We were referred to no authority which decides that the word "prostitution" in the Code includes sexual intercourse between a woman and one man exclusively. It is for parliament and not the Courts to extend the prohibition and penalty to fornication or adultery. The word "prostitution" in the section evidently means promiscuous sexual intercourse with men.

The Court is unanimous in this opinion and it is, therefore, unnecessary to consider or discuss the other grounds of appeal. The appeal will, therefore, be allowed, the conviction quashed and the prisoner discharged.

Conviction quashed.

[SUPREME COURT OF ALBERTA.]

BEFORE STUART, J.

REX v. SWETT.**1. HABEAS CORPUS (§ I D—21) — NOTICE OF MOTION — ALBERTA CROWN RULES.**

A motion for a writ of habeas corpus and a writ of certiorari in aid is properly instituted by serving a notice of motion under the Alberta Crown Practice Rules at least where the accused is in custody under a magistrate's conviction.

2. HABEAS CORPUS (§ I D—21) — SERVING NOTICE ON ATTORNEY-GENERAL — STATUS OF LOCAL AGENT.

A notice of motion for a writ of habeas corpus required under Alberta Crown Practice Rule to be served "upon the Attorney-General" need not be served personally upon that official; it is enough that service is made at the Attorney-General's office in Edmonton, but service on his local agent elsewhere will not be allowed as its equivalent without proof of the local agent's authority to receive service in the particular case or a waiver by the Attorney-General of regular service.

3. SUMMARY CONVICTIONS (§ III—30) — IRREGULAR PLEA — STATEMENT OF ACCUSED IN ANSWER TO CHARGE.

The answer of the accused on a charge of frequenting a disorderly house contrary to sec. 238 of the Criminal Code, sub-section (k) that he "was there if that made him guilty," is not equivalent to a plea of guilty.

[See also the new sec. 229 of the Criminal Code as amended 1913, making it an offence to be found in a disorderly house without lawful excuse.]

4. EVIDENCE (§ VII—581) — DISPROVING PLEA OF GUILTY STATED IN SUMMARY CONVICTION.

On a habeas corpus motion attacking a summary conviction as upon a plea of guilty for a vagrancy offence, the defendant's affidavit is admissible to shew that he did not plead guilty but had admitted only one of the essential circumstances which must concur to constitute an offence.

DECIDED: November 14, 1914.

MOTION for writs of habeas corpus and certiorari in aid, in respect of an alleged illegal summary conviction for a vagrancy offence.

The prisoner was discharged.

Sec. 238, sub-sec. (k), of the Criminal Code, 1906, provides that—

Every one is a loose, idle or disorderly person, or vagrant, who . . . (k) is in the habit of frequenting such houses [houses of ill-fame, etc.] and does not give a satisfactory account of himself or herself.

Peacock, for the motion.

Shaw, for the Crown.

STUART, J.:—This is an application for habeas corpus and certiorari in aid.

Some question was raised as to whether the new Crown Practice Rules which do away with the practice of beginning by summons and provide for service of a notice of motion are wide enough in their terms to cover an application for a writ of habeas corpus.

Rule 1 says: "In all cases in which it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by notice of motion in the first instance instead of by certiorari or by rule or by order *nisi*."

Rule 19 says: "The notice of motion for prohibition, certiorari, *quo warranto*, mandamus or habeas corpus, shall be returnable before a Judge of the Supreme Court or the Appellate Division."

Rules 17 and 18 also refer to habeas corpus applications.

I think, therefore, that there can be no doubt that a notice of motion is all that is required at least in those cases of habeas corpus where in order to succeed an order must be made quashing a conviction or an order or a warrant or inquisition as set forth in Rule 1. There are, of course, other circumstances in which a writ of habeas corpus may be required, such as an application to obtain possession of a child or to obtain the release of a person held in custody without any conviction, order, warrant or inquisition. What the practice should be in such a case it is not necessary for me to determine now. In the present case the accused is in custody under a conviction made by a magistrate and in such a case I think it is clear that a notice of motion is all that is required. It is a matter of the practice of the Court only.

A question was also raised with respect to the service of the notice of motion. Rule 2 provides that it shall be served "upon the Attorney-General." According to the recent decision of the Appellate Division in *Lawler v. City of Edmonton* this does not necessitate personal service. I am of opinion that service at the office of the Attorney-General is all that is required, but I think that at least that kind of service is required and that service upon a local agent of the Attorney-General is not sufficient in the absence of anything to shew that the Attorney-General has constituted such local agent an agent for that purpose. Inasmuch as in this case Mr. Shaw appeared for the Attorney-General and stated that he was instructed to so appear I do not think the present application should fail on that ground even if it were the case that no service was made at the Attorney-General's office in Edmonton. I think it well to intimate, however, that in any future case I could not allow service on the local agent as sufficient unless some evidence is given that he has been constituted a general agent for that purpose or a special agent to receive service in the particular case or unless counsel appears for the Attorney-General and waives the objection.

The accused was convicted by Mr. Wilson a justice of the peace at Drumheller "for that he on the 11th day of October, 1914, did commit an offence by being a frequenter of a disorderly house."

The information was in the words "did commit an offence by being a frequenter of a disorderly house contrary to ch. 146, sec. 238, sub-sec. (k), of the Criminal Code of Canada."

By the affidavit of George R. Bates it appears that the notice of motion was served on the convicting magistrate on November 5. It was stated by Mr. Shaw that the magistrate had informed him that he had complied with the rule and had forwarded all the papers in his possession to the proper office. Upon enquiry at the office both of the District Court Clerk and the Supreme Court Clerk it is impossible to find the original papers so returned. I am, therefore, driven to use the material presented to me by the applicant.

According to the affidavit of the applicant there was no evi-

dence taken, but the magistrate convicted him apparently as pleading guilty merely because in answer to the charge he had said, "I was there if that makes me guilty."

There is nothing upon the record to contradict this statement so far as the verified copies disclose. There is no affidavit by the magistrate contradicting it, and, as I think the affidavit of the applicant is admissible for such a purpose, at any rate in the case of a summary conviction, I must assume that the applicant's account of what happened is correct.

It is obvious, therefore, that the conviction cannot be supported. The statement made by the accused was clearly not a plea of guilty. Even if we assume that sub-sec. (k) of sec. 238, creates or describes an offence it is beyond argument that the answer given by the applicant was not an admission that he had committed the offence described. To admit being in a house of ill-fame on a certain occasion is surely not equivalent to an admission that he was in the habit of frequenting it.

This being so there is no need to consider the other objections made and there must be an order quashing the conviction and releasing the prisoner. No costs.

Prisoner discharged.

[COURT OF KING'S BENCH FOR MANITOBA.]

BEFORE GALT, J.

Re CHAMBYK.

I. ALIENS (§ III—16)—ALIEN ENEMIES—ARREST BY MILITARY AUTHORITIES.

In performing the duty of arresting and detaining (*inter alia*) persons of a nationality at war with Great Britain who attempt to leave Canada and in regard to whom there is reasonable ground to believe that their attempted departure is with a view to assist the enemy (Proclamation of August 15, 1914) a wide discretion is left to the military commanding officers, which will not ordinarily be reviewed or interfered with by the Courts under habeas corpus process.

ARGUED: November 11, 1914.

DECIDED: November 14, 1914.

MOTION for a writ of habeas corpus.

The writ was refused.

H. M. Hannesson, for the applicant.

E. Anderson, K.C., for the Dept. of Justice, and for Col. Lindsay, respondent.

GALT, J.:—The material upon which the motion is based is an affidavit by the applicant as follows:—

1. That I was born in Galicia in the Empire of Austria-Hungary, but left the said empire at the age of 17 years, coming to Canada shortly thereafter.

2. That I am now of the age of 23 years and since my departure from Austria-Hungary and arrival in Canada I have continually resided in and worked as labourer in the said Dominion of Canada.

3. That I never enlisted in or served in the armies or forces of the Empire of Austria-Hungary or Germany, or any other enemy of the Kingdom of Great Britain and Ireland and the British Empire, and am not a reservist or otherwise subject to call for services in any of said armies.

4. That on or about the 28th day of September, 1914, I was arrested near Assiniboia, in the Province of Saskatchewan, by an officer of the Royal North West Mounted Police and sent to the City of Winnipeg.

5. That I have since and am now detained as a prisoner by the military authorities and in particular Col. Lindsay, in the said City of Winnipeg and unlawfully refused my liberty and forcibly detained against my will.

6. That at the time of my said arrest the said representative of the Royal North West Mounted Police enquired of me as to what I was doing and where I was going and I informed him that I was going to the State of Montana in the United States of America, for the purpose of homesteading, which was at that time my *bonâ fide* intention.

7. That I have never been in the service of the Empires of Austria-Hungary or Germany, or other enemy of the Kingdom of Great Britain and Ireland or the British Empire and have committed no criminal act or infringement of the criminal or other Code of the British Empire to my knowledge.

8. That I had no intention of leaving, did not and do not intend to leave Canada for the purpose of serving armies of or otherwise assisting any of the enemies of the Kingdom of Great Britain and Ireland or the British Empire, and I am prepared and willing to take my oath of allegiance and otherwise acquire the rights of citizenship with its attending obligations in the Dominion of Canada.

The applicant's brother, Iwan Chamryk, of the City of Winnipeg, states (paragraph 2): "That my brother is now of the age of 23 years, having arrived in Canada at the age of 18 years," and he believes his said brother Josef Chamryk is not friendly or working in the interests of the Austrian or German Empires, and was not leaving, and had no intention of leaving Canada for the purpose of enlisting or serving in any of the said armies or otherwise against the Kingdom of Great Britain and Ireland or the British Empire.

An affidavit by the applicant's solicitor was also read, setting forth the efforts he has made to obtain the release of his client, and shewing that the military authorities were holding an investigation with regard to the applicant, and a final conclusion that the applicant would not be given his liberty.

The application is opposed by Mr. Anderson, appearing both for the Department of Justice and for Col. Lindsay. An affidavit by Col. William Henry Lindsay contains the following statements:—

1. That I am a Lieutenant-Colonel in the militia of Canada on active service on the staff of military district No. 10, the head-quarters of which are at the city of Winnipeg aforesaid.

2. I am in charge of the prisoners of war interned at Fort Osborne barracks, the head-quarters for military district No. 10 aforementioned, and am acting under instructions from Col. Samuel Steele, District Officer commanding said military district, and also under Colonel Sherwood, Chief Commissioner of Dominion Police for Canada.

3. In the month of September, 1914, a member of the North West Mounted Police Force of Canada delivered over to me in my capacity as above mentioned Josef Chamryk to

be interned as a prisoner of war upon the ground that the said Josef Chamryk attempted to depart from Canada with a view of assisting the enemies of Canada and of Great Britain, and the said Josef Chamryk is retained by me as a prisoner of war.

4. In my opinion there is reasonable ground to believe that said Josef Chamryk attempted to depart from Canada with a view of assisting the enemies of Canada and of Great Britain.

5. The persons who are attempting to obtain the release of the said Josef Chamryk are his brother and brother-in-law, who are both reservists in the army of Austria-Hungary, both married men, and their families residing in Austria.

It appears from the above material that the applicant is a subject of Austria-Hungary, now at war with Great Britain, and that he has been resident for some years in Canada, but shortly after the war broke out he decided to leave Canada for the alleged purpose of homesteading in the state of Montana, one of the United States of America.

On August 15, 1914, the following proclamation was published in the *Canada Gazette*:—

Whereas a state of war exists between the United Kingdom of Great Britain and Ireland and the German Empire, and between the United Kingdom of Great Britain and Ireland and the Austro-Hungarian Monarchy;

And whereas certain instructions have been received from His Majesty's government in connection with the arrest and detention of subjects in Canada of the German Empire and of the Austro-Hungarian monarchy and particularly of those who attempt to leave Canada;

And whereas there are many persons of German and Austro-Hungarian nationality quietly pursuing their usual avocations in various parts of Canada, and it is desirable that such persons should be allowed to continue in such avocations without interruption—

Now know ye that by and with the advice of our Privy Council for Canada, we do by these presents proclaim and direct as follows:—

1. That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council or proclamation.

2. That

(a) All German or Austrian or Austro-Hungarian officers, soldiers or reservists who attempt to leave Canada;

(b) All subjects of the German Empire or of the Austro-Hungarian monarchy in Canada, who attempt to leave Canada, and in regard to whom there is reasonable ground to believe that their attempted departure is with a view to assisting the enemy; and

(c) All subjects of the German Empire or of the Austro-Hungarian monarchy in Canada engaged or attempting to engage in espionage or acts of a hostile nature, or giving or attempting to give information to the enemy, or assisting or attempting to assist the enemy, or who are on reasonable grounds suspected of doing or attempting to do any of the said acts; be arrested and detained.

3. That in addition to and without affecting the power already vested in the militia in that behalf power to effect the arrest and detention of all or any person or persons coming within any of the classes mentioned in paragraph (2) hereof be vested in the Chief Commissioner and the Commissioners and constables of the Dominion Police Force; the Commissioner, officers and constables of the Royal North West Mounted Police; and such other persons as may be authorized so to do by the Chief Commissioner of Dominion Police.

4. That such authorities and officers mentioned in paragraph (3) hereof, or the militia, be authorized to release

any such person so arrested or detained as aforesaid of whose reliability they may be satisfied on his signing an undertaking in the form following:—

Undertaking.

I, _____ at present of _____ in the Province of _____, in the Dominion of Canada, do hereby declare that I am a German _____ an Austro-Hungarian subject; I now in consideration of my exemption from detention as a subject of _____ Germany, _____ Austria-Hungary, do hereby undertake and promise that I will report to such official and upon such terms as the Canadian authorities may from time to time prescribe; that I will carefully observe the laws of the United Kingdom of Great Britain and Ireland and of Canada and such rules as may be specially laid down for my conduct; that I will strictly abstain from taking up arms and from doing any act of hostility towards the government of this country, and that, except with the permission of the officer under whose surveillance I may be placed, I will strictly abstain from communicating to any one whomsoever any information respecting the existing war or the movements of troops, or the military preparations which the authorities of Canada or Great Britain may make, or as respects the resources of Canada, and that I will do no act that might be of injury to the Dominion of Canada or the United Kingdom of Great Britain and Ireland and the Dominions and possessions thereof.

Dated this _____ day of _____, 1914.

Witness:

.....

5. That any such person so arrested and detained as aforesaid, of whose reliability the officer or authority making the arrest is not satisfied, or who refuses to sign such undertaking, or having signed same fails to abide by its terms, be interned by such authorities and officers or militia according to the usages and laws of war in such place as may be provided by the militia, and that if it be deemed necessary that guards be placed on persons so interned, such

guards be furnished by the active militia of Canada on the request of such authorities or officers to officers commanding divisional areas and districts.

6. That all such authorities and officers or militia who may exercise any of the powers above mentioned be directed to report in each case to the Chief Commissioner of Dominion Police stating the name, address and occupation of the person detained or paroled, the date and place of detention and generally the circumstances of the arrest and detention and all such information as may be necessary or useful for the purposes of record and identification.

Of all which our loving subjects and all others whom these presents may concern, are hereby required to take notice and to govern themselves accordingly.

The following public notice dated September 2, 1914, was published in the *Manitoba Gazette* of September 19, 1914, by the authority of the Under-Secretary of State for External Affairs:

To all whom it may concern.

It has come to the attention of the Government that many persons of German and Austro-Hungarian nationality who are residents of Canada are apprehensive for their safety at the present time. In particular the suggestion seems to be that they fear some action on the part of the Government which might deprive them of their freedom to hold property or to carry on business. These apprehensions, if they exist, are quite unfounded.

The policy of the Government is embodied in a Proclamation published in the *Canada Gazette* on the fifteenth day of August, A.D. 1914. In accordance with this Proclamation restrictive measures will be taken only in cases where officers, soldiers or reservists of the German Empire or of the Austro-Hungarian monarchy attempt to leave Canada or where subjects of such nationalities engage or attempt to engage in espionage or acts of a hostile nature or to give information to or otherwise assist the King's enemies. Even where persons are arrested or detained on the grounds

indicated they may be released on signing an undertaking to abstain from acts injurious to the Dominion or the Empire.

The Proclamation after stating that "there are many persons of German and Austro-Hungarian nationality quietly pursuing their usual avocations in various parts of Canada and that it is desirable that such persons should be allowed to continue in such avocations without interruption," directs as follows:—

That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or engaging or attempting to engage in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council, or proclamation.

Thus all such persons so long as they respect the law are entitled to its protection and have nothing to fear.

It is argued on the one hand by Mr. Hannesson that the applicant has been quietly pursuing his usual avocation in Canada, and although he is of Austro-Hungarian nationality, he is entitled to enjoy the protection of the law under the provisions of the Proclamation of August 15. On the other hand, Mr. Anderson contends that the applicant is an alien enemy and therefore disentitled to the usual rights of citizenship.

The questions arising in connection with this case are unusual and, having regard to the terms of the Proclamation, and Public Notice above quoted, are quite unprecedented.

Under a recent proclamation in England, set forth and commented on in the *Solicitor's Journal* for September 12, 1914, page 817:—

The expression "enemy" in this proclamation means any person or body of persons of whatever nationality, resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resi-

dent nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country.

The writer of this article says:—

It will be seen that the vexed question as to the position of German or Austrian subjects resident in this or a neutral country has been solved by the Proclamation in the way we have all along maintained; such aliens are not to be regarded as alien enemies.

The difficulty in which the applicant finds himself is that, on his own shewing, he is not entitled to the protection specially afforded by the Proclamation to persons of German and Austro-Hungarian nationality quietly pursuing their usual avocations and desiring to be allowed to continue in such avocations without interruption. His intention was, and probably still is, to leave the country.

A suspicious circumstance is noticeable in his affidavit where his age has been changed from 18 to 17 years, when he left Austria-Hungary, but his brother swears he was 18. The obligation to serve in these foreign armies as commonly understood is from 18 upwards.

Our Proclamation of August 15, sec. 2, expressly provides that persons in the position of the applicant, in regard to whom there is reasonable ground to believe that their attempted departure is with a view to assisting the enemy, be arrested and detained. The applicant states in paragraph 8 of his affidavit that he is prepared and willing to take his oath of allegiance and otherwise acquire the rights of citizenship with its attending obligations in the Dominion of Canada; but he does not attempt to take advantage of the undertaking set forth in para. 4 of the Proclamation, which provides

that such authorities and officers mentioned in paragraph (3) hereof, or the militia, be authorized to release any such person so arrested or detained as aforesaid of whose reliability they may be satisfied on his signing an undertaking in the form following, etc.

It is manifest from the Proclamation that a large number of

German and Austro-Hungarian subjects are residing in Canada, many of them desiring to peaceably continue to follow their usual avocations; but there is undoubtedly good reason to believe that a large number would assist the enemy, if they could, either by joining the enemy's armies or by removing to a neutral country and giving valuable information to the enemy as regards conditions in Canada. The military authorities have been entrusted with the duty of arresting and detaining all such persons of enemy nationality in regard to whom there is reasonable ground to believe that their attempted departure is with a view to assisting the enemy.

The duty is one of public policy and in performing it a wide discretion is left to the commanding officers in charge of the various districts.

In the present instance, Col. Lindsay states that, in his opinion, there is reasonable ground to believe that the said Josef Chamryk attempted to depart from Canada with a view to assisting the enemies of Canada and of Great Britain. He further points out that the persons who are attempting to obtain the release of the said Josef Chamryk are his brother and brother-in-law, who are both reservists in the armies of Austria-Hungary, both married men, and their families residing in Austria.

I think it would be most unwise to hamper the actions of the militia to whom has been entrusted the duty of protecting this country from hostile acts of aliens.

The general nature of the writ of habeas corpus, as set forth in Halsbury's Laws of England, vol. 10, para. 90, is this:—

The writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention whether in prison or private custody. It is a prerogative writ by which the King has a right to inquire into the causes by which any of his subjects are deprived of their liberty. It is a remedial mandatory writ by which the High Court and the Judges of that Court, at the instance of a subject aggrieved, can command the production of that subject and inquire into the cause of his imprisonment.

It is clear from the Proclamation set forth in the *Solicitor's Journal* that a German or Austrian subject resident in England is not to be regarded as an alien enemy. On the other hand it appears to me equally clear that such residents in Canada are not subjects of His Majesty.

Under existing conditions, and having regard to the terms of our Proclamation of August 15, I doubt whether any of such aliens has a right to this particular and extraordinary remedy of habeas corpus. At all events, I hold that the applicant has no such right.

For these reasons, the motion will be dismissed.

Application dismissed.

[COURT OF APPEAL FOR MANITOBA.]

BEFORE HOWELL, C.J.M., RICHARDS, PERDUE, CAMERON AND
HAGGART, J.J.A.

REX v. PRICE and BURNETT.

**1. CRIMINAL LAW (§ II B—49)—ELECTION AGAINST SUMMARY TRIAL BY
MAGISTRATE—SUBSEQUENT ELECTION OF SPEEDY TRIAL.**

The option which under Code sec. 778, as amended 1909, is given the accused under Part XVI. of the Code to be tried by the magistrate without the intervention of a jury or to remain in custody or under bail to be tried "in the ordinary way by the Court having criminal jurisdiction" includes upon an election of the latter alternative the prisoner's right after having been brought before the County Court Judge or other officer under the speedy trials clauses (Part XVIII.) to decide whether he will take a "speedy trial" without a jury or be tried at the jury Court; and, since the amendment of 1909, this right is not affected by Code sec. 830 as the election against summary trial by the magistrate is no longer an election "to be tried by a jury." (Code sec. 830.)

[*R. v. Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608; *R. v. Sovereign*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356; *R. v. County Judge's Criminal Court*, 23 Can. Cr. Cas. 7, 16 D.L.R. 500, considered.]

ARGUED: November 20, 1914.

DECIDED: November 24, 1914.

CROWN case reserved by Mathers, C.J., of the Court of King's Bench.

On November 6, 1914, the prisoners were charged at the Winnipeg Police Court before the police magistrate of the said city (Winnipeg being a city having a population of over 2,500 according to the last decennial census taken under the authority of an Act of Parliament of Canada) with having obtained \$35 by false pretences with intent to defraud. The said police magistrate thereupon made to the prisoners the statements required by sub-sec. (2) of sec. 778 of the Criminal Code. The prisoners after such statements were made to them elected for trial before a jury. The said police magistrate then proceeded as directed by sec. 785 of the Code and the prisoners were committed for trial and such election is stated in the warrant of commitment for trial. An indictment against these prisoners was taken before the grand jury on November 7, 1914. On the morning of November 9, 1914, the accused, through their counsel, notified the sheriff that they elected for trial by a Judge without a jury under the provisions of the Code relating to speedy trials. The sheriff refused to take the proceedings required by sec. 826 of the Code. On the afternoon of the same day, the grand jury returned the indictment into Court endorsed "true bill." Immediately thereafter the prisoners were arraigned, when their counsel objected that they should not be asked to plead to the indictment as the accused elected to be tried by a Judge without a jury. The regular term or sittings of the Court at which such trial by jury would take place commenced on November 3, 1914, and was still in session. The learned Chief Justice of the King's Bench ruled that sec. 830 of the Code applied and that the prisoners had not, under the circumstances, the right to elect for trial by a Judge without a jury and he directed that their trial should proceed before the jury at the assizes then being held. The prisoners were then called upon to plead and pleaded "not guilty."

Upon application of counsel for the accused, Mathers, C.J. K.B., reserved for the opinion of the Court of Appeal, the following question:—

1. Was I right in holding that the prisoners had no right to re-elect for a speedy trial by a Judge without a jury under the circumstances stated?

If the answer to the above question is in the affirmative the trial of the prisoners to be proceeded with before this Court.

If the answer be in the negative the prisoners to be at liberty to withdraw their plea and elect to take a speedy trial under the appropriate sections of part 18 of the Criminal Code.

E. R. Levinson, for accused, appellant.

John Allen, Deputy Attorney-General, for the Crown.

WINNIPEG, November 24, 1914.

HOWELL, C.J.M.:—By the Criminal Code, R.S.C. 1906, sec. 825, every person committed for trial for certain offences had a right to elect to be tried by a County Court Judge, and it was made the duty of the sheriff to give him the opportunity to elect. This provision is by sub-sec. 4 made applicable to any person "in custody awaiting trial on the charge." After this enactment follow a number of sections under the heading of "procedure" amongst which is sec. 830. To give any meaning to this section I must hold that under the Code, as it was in the Revised Statutes, notwithstanding the very inclusive language of sec. 825, that section did not apply to a prisoner committed under sec. 778. By the last mentioned section [prior to amendment of 1909—Ed.] the prisoner is asked if he consents to be tried by the magistrate, with the alternative, "or do you desire that it shall be sent for trial by a jury at the (naming the Court)."

Sec. 785 requires the magistrate to state in the warrant the election, so if he made an election of trial by jury (the only method of trial permitted by clause 778) the magistrate must state in the warrant that the prisoner elected to be tried by a jury.

Sec. 830 then states that, 1st, if the accused has been asked to elect to be tried by the magistrate or before a jury; 2nd, if he has elected to be tried by a jury; 3rd, if such election is stated in the warrant; the sheriff shall not be required to take the party before the County Court Judge for election. Sub-sec. 2 of that section is as follows:—

2. If such person, after his said election to be tried by a jury, has been committed for trial he may, at any time before the regular term or sittings of the Court at which such trial by jury would take place, notify the sheriff that he desires to re-elect.

It is apparent that by this sub-section it was treated as a case where the accused had only a right of electing to be tried by a jury, and this is accentuated by the last word "re-elect." Sub-sec. 3 but reiterates that the prisoner has elected to be tried by a jury, for it provides "shall be proceeded against as if his said election in the first instance had not been made."

Briefly then, under sec. 778 [prior to amendment of 1909—Ed.] the prisoner's rights were only to elect to be tried by the magistrate or by a jury at a Court which is named. Under sec. 785 the magistrate must set forth in the warrant that the accused has elected to be tried before a jury if that is his election. Under sec. 830, if he has so elected, and if the warrant so states, then the accused has limited rights to get an election before the County Court Judge.

I shall now consider the amendments of the Code by 8 & 9 Edw. VII. ch. 9.

Sub-sec. 2 of sec. 778 is amended by changing the question to be put by the magistrate to the accused. By it the magistrate shall state to the accused "(b) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the Court decides. to be tried in the ordinary way by the Court having criminal jurisdiction," and this, of course, is the only election which the accused has. He must elect between trial by the magistrate, or "in the ordinary way by the Court having criminal jurisdiction." He has not power there to elect to be tried by a jury.

Now the ordinary way is pursuant to sec. 825; the Court having criminal jurisdiction is either the County Court Judge or the assizes with a jury, and it is the prisoner's right, after being brought before the County Court Judge, to decide which shall be the Court.

With the change in sec. 778 it seems to me the magistrate

should not set forth in his warrant as required by sec. 785 that the accused elected to be tried by a jury (a thing he was not called upon to do, and had no power to do), but should have set forth "the fact of such election having been made," that is, the election required by the amendment to sec. 778. It follows that the committal by the police magistrate thereby becomes an ordinary one and sec. 825 applies. The accused has not been called upon to elect and has not elected to be tried by a jury and, therefore, sec. 830 does not apply to this case and is not applicable to Part XVI. of the Code.

I think an accused person dealt with under sec. 778 as amended must now be dealt with as provided by sec. 825 without regard to sec. 830.

In *Rex v. Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, it was held in this province that a prisoner had a right to elect under sec. 825 even after the grand jury had found a true bill. That decision came up for discussion in *R. v. Sovereign*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356, 26 O.L.R. 16. The Chief Justice of Ontario and Mr. Justice Maclaren refused to follow that case. Mr. Justice Magee agreed with the Manitoba decision and the other two Judges express no opinions on the subject. I think I can state that in the case before them any remarks on *Rex v. Thompson*, *supra*, might well be considered as *obiter*.

The Manitoba case came up for consideration very recently before the Full Court of Nova Scotia, in the case of *Rex v. County Judge's Criminal Court*, 16 D.L.R. 500, 23 Can. Cr. Cas. 7. In that case the Judges at some length discussed the Ontario case above referred to and followed the Manitoba case in preference to it, and clearly the Nova Scotia Court has taken the same view of the law as that taken in *Rex v. Thompson*.

With great deference to the carefully considered judgment of the Chief Justice of the King's Bench, I think the accused is entitled to an election before the County Court Judge.

I would answer the question submitted by the learned Chief Justice in the negative.

RICHARDS, J.A. :—The learned Chief Justice, who has stated the case under consideration, held that, because of sec. 830 of

the Code, the accused, who had been committed for trial after the beginning of the Winnipeg Assizes, "the regular term or sittings of the Court" at which the accused's trial by jury would take place, he, the accused, had not the right to elect to be tried at the County Court Judge's Criminal Court.

The application of sec. 830 to a case such as this depends, as I read it, on the happening of three things, which seem to me to be conditions precedent to such application: 1st. If under Part XVI. . . . any person has been asked to elect whether he would be tried by the magistrate . . . or before a jury. 2nd. And he has elected to be tried by a jury. 3rd. And if such election is stated in the warrant of committal for trial.

The second sub-section says, "If such person," etc., thereby limiting it to a person in whose case the above three conditions have arisen. Since the amendment made in 1909, to sec. 778, the accused, in such a case as this is no longer asked whether he will be tried by the magistrate without a jury, or be tried by a jury, as he was, in effect, asked before that amendment. Since 1909 the law has been that, in such a case as this, the accused is told that he has the option to be tried by the magistrate or "to be tried in the ordinary way by the Court having criminal jurisdiction."

A choice of the latter alternative does not imply an election to be tried by a jury. It only means that the accused refuses to be tried by the magistrate and reserves to himself all rights he has as to his manner of trial if committed for trial. Those rights include the right to elect to be tried at the County Court Judge's Criminal Court. Therefore it seems to me that the first of the conditions precedent to sec. 830 applying has never arisen. I also doubt if the second condition has arisen, though that need not be decided.

If I am right in the above, sec. 830 has probably become inoperative as to Part XVI. of the Code. The argument that if that had been the intention of Parliament it would have been repealed when the Act of 1909 was passed, is met by the fact that sec. 830 applies to Part XVII. as well, and the election before

the magistrates in the latter part (by sec. 807) has not been changed. So that there is because of Part XVII. still a reason for the existence of 830.

Before the true bill was bound the accused, by their counsel, notified the sheriff that they elected to be tried by the County Court Judge's Criminal Court. Later, on the same day, a true bill was found by the grand jury.

Assuming, however, that the bill was so found before the accused did elect, I think the case of *Rex v. Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, applies, and that the accused still has the right of election.

With deference I would answer in the negative the question asked by the stated case.

PERDUE and CAMERON, JJ.A., concurred with HOWELL, C.J.M.

HAGGART, J.A.:—Section 778 of the Criminal Code, ch. 146, R.S.C., as amended by ch. 9, 8 & 9 Edw. VII., provides that—

(2) If the charge is not one that can be tried summarily without the consent of the accused, the magistrate shall state to the accused (a) that he is charged with the offence, describing it, (b) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction.

There was open to the prisoners the two alternatives. The prisoners exercised their option and chose the latter, namely, "to be tried in the ordinary way by the Court having criminal jurisdiction." That does not mean that the prisoners elected to be tried by a jury. It is true that the assizes is a "Court having criminal jurisdiction." The County Court Judge is also a "Court having criminal jurisdiction." Sec. 824 of the Code enacts that—

The Judge sitting on any trial under this part, for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a Court of record, etc.

There was clearly no election here and could be no election as between a jury and a County Court Judge.

Under these circumstances the prisoners were after the commitment entitled to the benefit of sec. 826 and following sections relating to procedure, and to be brought before the Judge and pursuant to sec. 827 to be told by the Judge that they had "the option to be tried forthwith before a Judge without the intervention of a jury or to remain in custody or under bail as the Court decides to be tried in the ordinary way by the Court having criminal jurisdiction."

With all due respect to the Chief Justice of the King's Bench, I would answer in the negative the question reserved for the opinion of this Court, and would direct that the prisoners be at liberty to withdraw their plea and elect to take a speedy trial under the appropriate sections of Part XVIII. of the Criminal Code.

I do not think under the circumstances that this case is a re-election as is contemplated by sec. 830—which the Chief Justice considered to be decisive of the question before the Court. A careful reading of this section shews that it applies to a "person after his election to be tried by a jury." Here, strictly speaking, the prisoners have never elected to be tried by a jury. If there is any discrepancy or apparent contradiction between this section of the Code and the former sections referred to as amended in 1909, then the former, being the later enactments, would govern.

The Crown simply wants a judicial interpretation of the statute and the foregoing is my reading of it.

Defendants' appeal allowed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE GRAHAM, E.J., AND RUSSELL, LONGLEY AND DRYSDALE, J.

REX v. GOVERNOR OF CITY PRISON.**Ex parte GREEN.****1. CRIMINAL LAW (§ IV E—126)—PLACE OF IMPRISONMENT—COMMON JAIL.**

The "city prison" for the City of Halifax is a common jail within the Canadian Naval Service Act, 1910, ch. 43, to which the commander of a ship in the Canadian Naval Service may sentence one of his seamen to be imprisoned for insubordination.

2. CRIMINAL LAW (§ IV D—122)—IMPRISONMENT—WHEN NINETY DAYS EXCEEDS THREE MONTHS' LIMIT.

Where the imprisonment has commenced under a sentence for ninety days and at a time of the year which would not include the month of February, and, consequently, the sentence would not in the ordinary course exceed three months which was the maximum penalty allowed for the offence, it is not a ground for discharge on habeas corpus that a ninety day sentence may under certain contingencies exceed the statutory limit of three months.

[*R. v. Gavin*, 1 Can. Cr. Cas. 59, distinguished.]

DECIDED: December 3, 1914.

W. J. O'Hearn, K.C., for the application.

A. G. Morrison, K.C., for the Canadian Department of Naval Service.

MOTION by way of *habeas corpus* for prisoner's discharge. The prisoner who was a member of the crew of H.M.C.S. "Diana" was sentenced by the commanding officer of that ship to 90 days' imprisonment in the city prison at Halifax for several minor infractions of the English Naval Discipline Act 1866 (9 Chitty's Statutes, p. 159) and the Naval Service Act (Can.) 1910, ch. 43.

The warrant was dated and the imprisonment was to run from the 1st day of October, A.D. 1914. Russell, J., granted an order in the nature of a writ of *habeas corpus* returnable before himself in chambers, and on the return of same referred the matter to the Full Court.

Morrison, K.C., for the Canadian Dept. of Naval Service,

took the preliminary objections that Canada being in a state of war the writ of *habeas corpus* was suspended, and that it would not go to review the proceedings of courts-martial. He cited the following authorities: *Closson v. The United States*, 7 App. Cas. (D.C.) 460; *In re Kempt*, 16 Wis. 379; *Ex parte Milligan*, 105 U.S. 696.

O'Hearn, K.C., for the prisoner, replied that the writ could only be suspended by statute, and that the remedy by *habeas corpus* was available where absence or excess of jurisdiction was shewn in any inferior tribunal, citing 10 Halsbury 44, 50, and Church on Habeas Corpus 43.

W. J. O'Hearn, K.C., for the prisoner: The commanding officer can only sentence for three months. Ninety days is more than three months: *R. v. Gavin*, 1 Can. Cr. Cas. 49. "Penal servitude" cannot be imposed. Imprisonment in the city prison is penal servitude. See sec. 241 Halifax City Charter, sec. 56 Naval Discipline Act and *R. v. Mount*, L.R. 6 P.C., Sir Montague Smith at page 304. Imprisonment must be in the common jail, sec. 12, ch. 43 (Can.), 1910.

A. G. Morrison, K.C., for the Naval Authorities: The imprisonment has begun from October 1st, and cannot exceed more than 90 days. *Gavin's case*, 1 Can. Cr. Cas. 49, only applies where the month of February is to be considered. The Halifax city prison is a common jail. City Charter, sec. 240(2).

O'Hearn, K.C., replied.

The judgment of the Court was delivered by

GRAHAM, E.J.:—This is an application, under the statute, in the nature of a *habeas corpus* proceeding, addressed to the Governor of the City Prison for the City of Halifax, to release a man by the name of Thomas Green. Green was imprisoned under the Naval Discipline Act, 1866 (Imperial) and the Naval Service Act of Canada, 1910, ch. 43, sec. 51. He was committed to prison by the commander of His Majesty's ship "Diana" at the port of Halifax for remaining absent over leave, and making use of threatening and insulting language towards a petty officer, and refusing duty and having a bottle containing spirits in his possession in His Majesty's Dockyard.

~~THE FOLLOWING INFORMATION IS UNCLASSIFIED~~
~~DATE 08-09-00 BY SP-6 BJS/BJS~~
~~REASON FOR DECLASSIFICATION: 25X~~

THE FBI IS REQUESTING THAT YOU ADVISE US OF ANY INFORMATION THAT MAY BE OF INTEREST TO US IN CONNECTION WITH THE ABOVE MENTIONED MATTER.

By the foregoing facts it is seen that the following are the principal reasons for the failure of the Government to secure the necessary funds to carry out its policy of maintaining the peace in the Philippines:

[illegible]

Here the place of my apartment is the ... head, and by statute ... Acts, this very Person at ... City of ...

The second point upon which the Government is attacked is that it is for the term of ninety days and by the end of the remainder could not impose a greater number of days than it could.

The only point that could be taken is that the term imposed exceeds three months.

In the present case the imprisonment has commenced and a computation of time could not be possible where the present term would exceed three months. That is in the ordinary course the month of February will not be included in the computation. There is no authority to controvert this. A decision of this Court was cited, *R. v. Garin*, 1 Can. Cr. Cas. 59, in which, as the prisoner was not then serving his sentence, it might be possible that the month of February would come into the term. No objection can be raised in this case that the term would be less than the term imposed by the statute. Such a condition

might arise where there was no maximum penalty but a fixed term of imprisonment. This point, then also fails, and the application must be dismissed.

Under the statute relating to *habeas corpus* proceedings it has been decided that there can be no costs.

Motion dismissed.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE SAINT-PIERRE, J.

REX v. EDWARDS.

1. BAIL AND RECOGNIZANCE (§ I—20)—DISCHARGE—TAKING ACCUSED IN CHARGE AFTER CONVICTION—CHANGE OF SENTENCE.

Where, after verdict of "guilty," the accused is taken into custody thereunder, his bail are discharged; so where on a plea of guilty by the accused appearing for summary trial, imprisonment is first adjudged, but after the accused has been taken in charge by the deputy sheriff, the magistrate has the accused recalled and imposes instead a fine with imprisonment in default, the bail is not responsible for the fine where the accused was not held in custody until paid, under a recognizance in terms to "appear and answer the charge and to be further on treated according to law."

2. BAIL AND RECOGNIZANCE (§ I—21)—CALLING THE BAIL UPON THE RECOGNIZANCE.

A previous notice to the bail is essential before a certificate of forfeiture can legally be issued for default of the accused to appear, where the latter and his bail were not called upon their recognizance on the day when he was bound to appear, and it is sought to estreat the recognizance at a later date.

[*R. v. Croteau*, 9 L.C.R. 67, and *Atty.-Genl. v. Beaulieu*, 3 L.C. Jur. 117, referred to.]

3. BAIL AND RECOGNIZANCE (§ I—17)—ESTREAT—EX PARTE JUDGMENT—ATTACK.

The *ex parte* entry of judgment by the prothonotary of the Superior Court in Quebec on a certificate of forfeiture of recognizance whether from the Court of King's Bench, criminal side, or from a magistrate's Court, is subject to attack in the Superior Court by any one of the modes of procedure authorized by its practice in regard to *ex parte* or default judgments.

4. BAIL AND RECOGNIZANCE (§ I—17)—ESTREAT—QUEBEC PRACTICE.

In the Province of Quebec (differing from the practice in other provinces) two modes of procedure are available for the collection of recognizances forfeited in the criminal Courts; one is by means of the *ex parte* judgment resulting upon the entry in the records of the Superior Court of the Province of Quebec of the recognizance and certificate of default, and the other by direct action at the suit of the Attorney-General of Canada, or of the Attorney-General of Quebec, or of other officer authorized to sue for the Crown.

[Cr. Code secs. 1114, 1115, and 1117, and R.S. Que. articles 3396, 3398, 3399, considered; *Re Hopfr's Bail*, 22 Can. Cr. Cas. 116, 10 D.L.R. 216, referred to.]

5. BAIL AND RECOGNIZANCE (§ I—17)—CERTIFICATE OF FORFEITURE—CONCLUSIVENESS.

A certificate of forfeiture of recognizance for appearance taken before a justice of the peace or police magistrate in Quebec is "conclusive evidence" under Cr. Code sec. 1114, and R.S. Que. article 3395, only for the purposes of the entry of the *ex parte* judgment authorized by Cr. Code sec. 1115; after such entry is made, the certificate of the breach of the recognizance as well as the judgment thereon may be attached by an "opposition to judgment" under the Quebec Code of Civil Procedure.

[Cr. Code secs. 1097, 1114 and 1117, and R.S. Que. article 3397, considered.]

6. COURTS (§ II A 6—177)—RECOGNIZANCE OF BAIL IN CRIMINAL COURTS—JURISDICTION ON ESTREATING.

In the Province of Quebec the bail against whom an *ex parte* judgment has been entered in the Superior Court on the removal thereto of the original recognizance and certificate of default (Cr. Code sec. 1113) from a criminal Court has no remedy in revocation of such certificate in the Court from which it issued; the sole jurisdiction in that regard is in the Superior Court after such removal, and may be exercised either before or after a writ of *feri facias* and *capias* has been issued thereon.

[*R. v. Hogue*, 21 Que. K.B. 24, dissented from.]

DECIDED: October 13, 1914.

OPPOSITION to judgment entered on a certificate of default against bail in a criminal proceeding in the Police Court, Montreal. A petition in revocation of such *ex parte* judgment was joined with the "opposition."

R. G. deLorimier, K.C., for opposants and petitioners.

P. R. Du Tremblay, for the Crown.

SAINT-PIERRE, J.:—On the 27th day of December, 1912, a group of theatrical performers composed of four men and about a dozen of women were arrested and brought before the police magistrate on the complaint of one John H. Roberts, who denounced them for having taken part in some indecent performances in one of the theatres of the city. They pleaded "not guilty" to the charge, and their trial which was to be under the Summary Convictions Act, was fixed for the 3rd day of January, 1913. On the same day (27th December), they all gave bail to secure their appearance on the day of their trial.

The bailsmen for Tom Mayo and James A. McInerney, two of the accused, were William A. Edwards and Oliver McBrien, for the sum of \$100 in each case.

As the punishment for such an offence when tried by summary conviction may be six months' imprisonment or a fine of fifty dollars, or both, and as those actors and actresses formed part of a company which had early engagements to fill in the United States, it was arranged, on the suggestion of their counsel, that on the 3rd of January, they would all put in a plea of "guilty," and be allowed to go free on suspended sentences, the Crown, however, reserving its rights to proceed against the lessees of the theatre, who were Montreal men, the latter agreeing to stand their trial on the charge of having allowed such performances to take place in their theatre, and assuming all the responsibility consequent upon said charges, if found guilty.

This arrangement was submitted to Seth P. Leet, Esquire, the police magistrate who was to preside over the Court on that day. The learned magistrate gave no formal assent, but offered no opposition to it.

Pursuant to the proposed arrangement, all the accused appeared in person on the 3rd day of January, 1913, and put in a plea of "guilty" to the charge.

The magistrate, however, would not consent to extend to all the accused the extreme leniency which was expected from him. He caused the complainant to give his evidence, and condemned the four men to five days' imprisonment and to a fine of twenty dollars and the costs, and to a further imprisonment of five days in the event of their failing to pay such fine and costs. All the other defendants were allowed to depart upon suspended sentences.

This sentence once pronounced against the four male accused, the magistrate left the bench and retired to his room.

Mr. Cinq-Mars, the high constable, who before the Police Court fills the functions of deputy-sheriff, at once took charge of the four condemned men and brought them to the prisoners' cells.

Upon representations, however, being made to the magistrate,

the latter consented to modify his sentence by striking off the five days' imprisonment. He, therefore, returned upon the bench, and the four prisoners being brought back before him, a modified sentence was then pronounced, said sentence being a condemnation to a fine of twenty dollars and the costs, and to five days' imprisonment in default of the said defendants failing to pay such fine and costs.

No time was fixed, at least at that particular moment, for the payment of said fine. True, the conviction which was drawn out later on contains the word "forthwith," but such word is not to be found in the minutes of the proceedings, and the evidence shews that the four men were allowed to leave the court room without any objection being offered, and to depart along with the female defendants whose sentence had just been suspended.

They never returned and the fines were never paid.

Some time later, the following certificate was inscribed on the back of the recognizance entered into by James A. McInerney as principal and William A. Edwards and Oliver McBrien as sureties:—

"I hereby certify that James A. McInerney did not appear at the time and place mentioned in the condition of the present bond, and that he hath failed to do so. Therefore, in consequence of said failure on his part, the amount mentioned in said bond is forfeited.

“(Signed) SETH P. LEET,

“Police Magistrate.”

A similar certificate was also entered on the back of the bond given by Tom Moya, the bailsmen in this last case being the same as in the case of McInerney.

This certificate bears no date, but Mr. Corriveau, the clerk of the Crown and of the peace, tells us in a sworn certificate which has been filed in the present case that it was made and signed on the 3rd day of February, 1913, one month exactly after the trial.

The condition of the bail bond (said bail bond which was drawn up in the French language being the same in each case) was that the principal party should appear on the 3rd of Janu-

ary, 1913, before the police magistrate who was to hear the case "to the end that he might answer the charge of 'indecenty' preferred against him and be further on treated according to law."

It is conceded that the four accused were personally present at their trial and at the time when their sentence was pronounced, but the contention of the Crown is that they should have remained in Court until the sentence was satisfied either by the principal parties paying the amount of the penalty imposed together with the costs of the suit, or by their offering to submit to the five days' imprisonment mentioned in the sentence in the event of their failing to make such payment. It is alleged that they having failed to do either, the magistrate under the terms of the recognizance was authorized by law to enter his certificate of default and to declare forfeited for the benefit of the Crown the amount mentioned in each of the two recognizances.

I cannot bring myself to agree with this contention thus put forward by the Crown, and this for several reasons: First, I find that under the terms of the recognizances, the obligation of the principal cognizors did not extend beyond their appearance in Court until after sentence was pronounced.

Article 1092, Cr. C., says: "The arraignment or convictions of any person charged and bound as aforesaid shall not discharge the recognizance, but the same shall be effectual for his appearance for trial or sentence as the case may be."

Now it is admitted that the principal parties to the two recognizances were present at their trial and that they actually received their sentence; they, therefore, fulfilled their obligation "to appear so that they might answer the charge of 'indecenty' preferred against them and be further on treated according to law" as was required by the recognizances. Having been personally present in Court to answer the charge, they were further on treated according to law when they received sentence.

But there is more to be said.

After receiving their first sentence, they were apprehended by the high constable and taken to the prisoners' cells. Now I hold that from the moment the sureties or bailsmen ceased to be the custodians or gaolers of their principals, their obligation under the bond came to an end.

The following citations from the American & English Encyclopedia of Law appear to me to be applicable to the above-mentioned facts:—

“If the principal was present during the trial at the rendition of the verdict and when sentence was pronounced against him, and immediately thereafter was taken into custody by the sheriff, the sureties are discharged.”—“If the defendant departs subsequently with the leave of the Court or sheriff his recognizance cannot be forfeited or his sureties liable thereon, as the recognizance is not conditioned that the defendant or his sureties shall pay or satisfy the judgment.”

(See 3 American and English Enc. of Law, pages 721 and 722 and judgments cited.)

Again: “Where after verdict of ‘guilty,’ a deputy sheriff seized hold of the principal and left the court room with him to conduct him to jail, it was held that the manual caption of the prisoner by the sheriff in the presence of the Court abated and dispensed with the necessity of a formal surrender of the prisoner by his bail and that they were released.”

(3 *idem.*, page 722, and cases cited.)

Commenting upon the above and other decisions cited by him, the compiler continues as follows:—

“After sentence is pronounced, the sheriff and not the bail is the proper custodian of the convict, and it has been held that the legal effect of the sentence is equivalent to a special order directing the sheriff to hold him in custody, and operates as an ‘exoneratur’ of the bail without formal entry to that effect.”

“If the sheriff or his deputy, in fact, arrest the principal,” adds the compiler, “the bails are, for stronger reasons, discharged.”

(See American & English Enc. of Law, vol. 3, p. 721.)

At page 715: “When, by virtue of a warrant lawfully issued upon an indictment for the identical offence for which the principal was held to answer, the sheriff has by his arrest taken the prisoner out of the custody of his sureties, they are released from liability, and nothing short of a new bond lawfully executed by them can restore their liability. If the sheriff afterwards

release the prisoner believing the sureties to be bound by the original recognizance they cannot be held liable for his escape."

There is more still to be said.

The proof shews that after the pronouncing of the modified sentence, McInerney and Moya were allowed to leave the court room freely and unopposed by any one. The high constable tells us that on hearing the modified sentence, which was a condemnation to the payment of a fine, he concluded that he had nothing more to do with his two prisoners and that he allowed them to go free.

On the other hand, we have also in evidence that the certificate of default was only entered by the magistrate on the 3rd day of February, 1913, one month after the day of the trial. Now it is clear that under such circumstances, no certificate of default could be validly inscribed on the bond without a previous notice being given to the sureties.

The following authorities which I also find in the same compilation will support that contention:—

"A recognizance conditioned that the prisoner appear at the next term and thereafter from day to day, binds the surety for the appearance of the prisoner during the first term of the Court only, and if the Court adjourns without making any order, the sureties are discharged."

(See Am. & Eng. Encyclopedia of Law, p. 714.)

On referring to the English text writers, I find that the same rule prevails in England:—

"Neither the defendant nor his bail, says the author of Bacon's Abridgement (vol. I., p. 497), can be called upon their recognizances without notice, except on the day on which the defendant is bound to appear."

Petersdorff (3 vol., p. 349) cites the following decision:—

"A motion was made that defendant and his bail might be called upon their recognizance. No notice had been given."—*Per curiam*: "We must refuse the application for as the defendant is not called upon at the day upon which he is bound to appear, but at a particular day, notice should have been previously given him."

The case of *Regina v. Croteau* and of the *Attorney-General*

v. *Beaulieu*, decided by our own Superior Court, are also in point. See 9 Lower Canada's Reports, p. 67, and 3 Lower Canada Jurists, p. 117.)

For all those reasons I have come to the conclusion that the certificate referred to in this cause was wrongfully and illegally entered upon the back of the two recognizances mentioned above and that the same should be declared null and void and set aside.

On the 6th day of February, 1913, the two recognizances in question, together with the certificates of default and forfeitures were estreated (that is to say, extracted and withdrawn from the Police Court) and sent up to the Superior Court where a judgment was entered up in the books of said Court, in order that the amount declared forfeited might be collected and recovered by the Crown, as provided for by article 1113 of the Criminal Code and 3394 of the Revised Statutes of the Province of Quebec.

Four judgments were thus entered up in the books of the Superior Court: A first one against William A. Edwards, and a second one against Oliver McBrien, in the case of Tom Moya, and a first one against the same William A. Edwards, and a second one against Oliver McBrien in the case of James A. McInerney; and on the tenth day of March, 1913, four writs of execution were issued and four seizures were practised against the goods and effects of the said William A. Edwards and Oliver McBrien.

The two defendants joined together and met those four *ex parte* judgments and the executions and seizures which had followed, by two "oppositions to judgment" in which they intermingled the allegations usually found in "petitions for revocation of judgments."

Their conclusions contain among other things the following prayer:—

"Wherefore the said opposants and petitioners pray . . . that the judgment of the 6th day of February last (1913) be annulled, rescinded, revised and revoked, and the executions and seizures of the goods and moveable effects of the said opposants and petitioners practiced in these cases set at nought and that *main levée* thereof be granted to said opposants and petitioners, the whole with a recommendation that their costs on their present proceedings be paid by the Crown."

As may be seen by the mode of procedure here resorted to, the two joint opposants and petitioners took it for granted that their remedy was to be urged before the Superior Court, and that the entering up in the books of said Court of the estreated recognizances together with the certificates of default of the two principal parties, and the attestation that the amount of the penalty mentioned in their recognizances had, in consequence of said default, been estreated for the benefit of the Crown, constituted an *ex parte* judgment of the Superior Court against which they had the right to oppose all the reasons or causes of nullity which might be urged against any ordinary judgment of said Court thus pronounced *ex parte* or by default.

I am now called upon, therefore, to decide whether the remedy (which no doubt must exist somewhere in favour of a defendant who has been the victim of a wrongful or illegal certificate of default and forfeiture) should in our province be sought for before the Superior Court or elsewhere.

I must declare at once that in my opinion, not only is the Superior Court the proper tribunal before which such a remedy should be sought for, but that said Superior Court is the only tribunal before which it may be urged by the aggrieved party, and by which it can be applied.

This question has in the past opened the door to much discussion and has lead to contradictory decisions in our Courts of justice. The error into which some of our Judges have fallen was due first to the assumption that the certificate of default, coupled with the declaration that the amount mentioned in the bond or recognizance had been forfeited, constituted a final judgment which could not be opposed nor set aside by our Superior Court. They could not entertain the idea that such a pretended judgment pronounced, for instance, by the Court of Queen's Bench, criminal side, could be interfered with by an inferior tribunal such as the Superior Court of the Province of Quebec is, when put in regard with the Court of Queen's Bench, which is the highest Court in our province.

It was clearly when labouring under such an erroneous impression that the learned Judges of the Court of Queen's Bench

(appeal side) pronounced their judgment in the case of *The King v. Hogue et al.*, on the 23rd day of May, 1911.

(See *The King v. Hogue et al.*, vol. 21st Official Reports, King's Bench, p. 24.)

In that case the Court of Appeals (Sir Louis A. Jette, Chief Justice, Trenholme, Cross, Archambault and Carroll) held, reversing the unanimous judgment of the Court of Review (Teller, Delorimier and Dunlop), that "when an order of estreat of a recognizance is made by the Court of Queen's Bench, Crown side, for a breach of its conditions, the subsequent entering up of a judgment by the prothonotary of the Superior Court, under art. 1115, Cr. C., is not a judicial, but a purely ministerial act of that officer, and does not vest the Superior Court with jurisdiction to inquire into or in any wise deal with the order of estreat."

With due respect for the learned Judges who pronounced that judgment, I purpose to shew (1) that the judgment entered up by the prothonotary on such occasion is a judgment of the Superior Court pronounced *ex parte* or by default, just as a judgment entered *ex parte* or by default upon a promissory note or upon a deed of obligation by the same prothonotary is a judgment of that Court; (2) that such judgment thus pronounced *ex parte* may be opposed by means of any one of the various modes of procedure provided for by our Code of Civil Procedure against such *ex parte* or default judgments; and (3) that when an estreated recognizance upon which an illegal or wrongful certificate of default has been entered, is taken to our Superior Court for collection, our said Superior Court is the only tribunal before which an aggrieved defendant may seek redress, and is the only tribunal which has the power and the authority to come to said defendants' relief.

First, let us disentangle our minds from any notion about criminal law or criminal procedure in this matter. The giving of a bond or the entering into a recognizance by a defendant or an accused person before a Court of criminal jurisdiction is not an act which falls under the authority of the criminal law; it is a civil contract by which the principal cognizor obliges himself

to pay to the Crown a certain sum of money, in the event of his failing to be present in Court on a given day, or of his failing to fulfil some other conditions mentioned in the bond or the recognizance in question. Such a contract may happen to have been entered into before a Judge of the Court of Queen's Bench holding the Criminal Assizes, but it may equally have been entered into before a simple justice of the peace, and the obligation assumed by the cognizor towards the Crown is no greater in the one case than in the other. It constitutes a civil contract and the action which arises in favour of the Crown as a result of the failure of the defendant or of the accused to fulfil its conditions, is a civil action for breach of contract. The certificate of default given by the justice of the peace or the Judge presiding the assizes is not a judgment which has any force in our province. It is simply an attestation given by the Judge or magistrate entered upon the back of the bond or recognizance as proof that the conditions of the bond or recognizance have not been fulfilled; and the declaration by the magistrate or the Judge that, in consequence of said breach of the contract, the amount mentioned therein has been escheated to the Crown is but the affirmation of what the contract itself states.

This certificate or attestation makes *primâ facie* proof of what is stated in it. But we will see that such *primâ facie* proof, sufficient and conclusive though it may be, if uncontradicted, to justify the entering up of irregular judgment, is susceptible of being rebutted by contrary proof before the Superior Court, in the same manner, for instance, as the amplification of a judgment *ex parte* or by default pronounced in the Province of Ontario may be contested when it is produced to form the basis of an action before the Superior Court in the Province of Quebec.

Before looking into the articles of the Criminal Code and of the Revised Statutes of the Province of Quebec which have reference to the mode of collecting extreated recognizances, let us first ascertain what the law in England is on the subject.

The following citation from Petersdorf (vol. 3, p. 355) will tell us what the old law was:—

“The causes which operate as a discharge of the recognizance have been considered (above).”

“If any of the conditions of that instrument” (the bail bond or the recognizance) “be not complied with, it becomes liable to be estreated, that is, taken out from among the records” (of the Court of criminal jurisdiction) “and sent to the Exchequer, which renders the party absolute debtor to the Crown for the sum or penalty therein mentioned.”

The author next refers to the remedy which may be applied for against an illegal or wrongful certificate or default. He says:—

“But as a forfeiture of that security is frequently incurred through mere inattention and ignorance, the statute of 4 Geo. III. ch. 10, empowers the Barons of the Exchequer to relieve, on petition, any person whom they deem object for indulgence.”

(See also on the same point I. Chitty's Criminal Law, p. 92. and Burn's Justice, vol. I., p. 941.)

This was the old law in England.

What is the law in force now?

It is exactly the same with the exception that by the 36 and 37 Vict. (Imperial Statute), ch. 66, secs. 16 and 32, and by an “Order in council dated 16 December, 1880,” the High Court of Justice (which Court, for the object in view, corresponds to our Superior Court) was substituted to the Court of Exchequer. (See Archbold, Criminal Cases, pp. 100 and 101.)

Two things must be observed in the law as it existed formerly and as now exists in England: the first one is that it is from the time when the estreated document is entered up in the books of the High Court of Justice, that the alleged defaulting cognizor becomes absolute debtor to the Crown, just as by the entering up of the same instrument in the books of our Superior Court by means of what our law calls “a judgment” the defaulting cognizor becomes similarly the absolute debtor to the Crown.

The second thing to be observed is that the remedy given to the aggrieved defendant against a certificate illegally or improvidently entered on the back of the bond or of the recognizance, is vested in the Court to which the estreated document has been sent up, to wit, formerly the Court Exchequer, but now

the High Court of Justice, both being Courts of civil jurisdiction, just as said remedy is vested in our Superior Court, as I will shew further on.

I find in "Sweet's Law Dictionary" that the practice in England in matters of estreated recognizances is the following:—

"Estreated recognizances in the superior Courts of assize are sent to the Exchequer, now to the High Court of Justice, while those before justices of the peace are sent to the sheriff with writs of execution to enable him to levy the amount."

(See vol. III. Amer. & Eng. Encyclopedia of Law, p. 451.)

We will now turn to our own Criminal Code in order to ascertain what variances exist between the laws in force in the English provinces of the Dominion, and those enacted for the Province of Quebec.

Under Part XXI. of our Criminal Code, the articles referring to forfeited recognizances are distributed under three distinct heads:—

1. Those the application of which is general and which are the law for all the provinces of the Dominion; 2. Those which are applicable to all the provinces except Quebec, and finally, 3. Those which apply solely to the Province of Quebec. Article 1097, which is one of general application enacts that when the conditions of the recognizance have not been complied with by the principal party, the justice who took the recognizance or any justice who is then present having certified upon the back of the recognizance the non-appearance of the person or the non-compliance with the condition, as the case may be, may transmit such recognizance to the proper officer in the province appointed by law to receive the same to be proceeded upon in like manner as other recognizance.

Such certificate, says the same article, shall be *primâ facie* evidence of such non-appearance or non-compliance.

In the Province of Ontario such recognizance and certificate of default are transmitted to the clerk of the peace of the county for which such justice is acting; and the Court of General Sessions of the peace for such county at its next sitting orders all such recognizances to be forfeited and estreated, and the

article further enacts that the same shall be enforced and collected in the same manner as any fines, forfeitures or amercements imposed by or forfeited before such Court.

(See article 1098, Crim. Code.)

In British Columbia, the proper officer to receive such recognizance and certificate is the clerk of the County Court, and the recognizance is enforced and collected in the same manner as any fines, forfeitures or amercements imposed by or forfeited before such Court.

In the other provinces of Canada such proper officer shall be the officer to whom the recognizance have been heretofore accustomed to be transmitted under the law heretofore in force; and such recognizances shall be enforced and collected in the same manner as like recognizance have heretofore been enforced and collected. (See article 1099, Crim. Code.)

Article 1100 provides that any forfeited recognizance shall be estreated by the Court before which the principal party thereto was bound to appear.

"In all the provinces of the Dominion except Quebec, all fines, issues, amercements and forfeited recognizances, set, imposed, lost or forfeited before any Court of criminal jurisdiction shall within twenty-one days after the adjournment of such Court, be entered and extracted on a roll by the clerk of the Court or in case of his death or absence, by any other person, under the direction of the Judge who presided at such Court, which roll shall be made in duplicate and signed by the clerk of the Court, or in case of his death or absence, by such Judge." (See article 1102, Crim. Code.)

If such Court is a superior Court having criminal jurisdiction, one of such rolls shall be filed with the clerk, prothonotary, registrar or other proper officer (a) in the Province of Ontario, of the High Court of Justice; in Nova Scotia, New Brunswick and British Columbia of the Supreme Court of the Province, and on or before the first day of the term next succeeding the Court by or before which such fines or forfeitures were imposed or forfeited. (See article 1104, Crim. Code.)

If such Court is a Court of general sessions of the peace, or a County Court, one of such rolls shall remain deposited in the office of the clerk of such Court.

The other of such rolls aforesaid shall as soon as the same is prepared be sent by the clerk of the Court making the same, or in case of his death or absence, by such Judge as aforesaid with a writ of *feri facias* and *capias* to the sheriff of the county in and for which such Court was holden. (See article 1105, Crim. Code.)

Let us see now what remedy is given to the defendant in the case when a recognizance was wrongfully or illegally estreated.

Such remedy may be applied for either before or after the *feri facias* and *capias* is handed over to the sheriff.

With respect to all recognizances estreated, says article 1108, if it appears to the satisfaction of the Judge who presided at such Court (that is to say, at the Court in which the person was bound to appear) that the absence of any person for whose appearance any recognizance was entered into, was owing to circumstances which rendered such absence justifiable, such Judge may make an order directing that the sum forfeited upon such estreated recognizance shall not be levied, and the clerk of the Court shall for such purpose, before sending to the sheriff any roll, with a writ of *feri facias* and *capias*, submit the same to the Judge who presided at the Court, and such Judge may make a minute on the said roll and writ of any such forfeited recognizance and fines as he thinks fit to direct not to be levied.

The sheriff shall observe the direction in such minute written upon such roll and writ or endorsed thereon. (See article 1108. Crim. Code.)

This article, as we see, explains how the remedy may be applied prior to the writ of *feri facias* and *capias* being handed over to the sheriff.

The next question is: How is the remedy to be applied if such writ has been issued, and if the property of the party who is liable under the estreated recognizance has been put under seizure?

The answer to this query is to be found in article 1110 of the Criminal Code under the heading "Discharge of forfeited recognizances."

Article 1110. The Court into which any writ of *fi. facias* and *capias* issued under the provisions of this part is returnable, may inquire into the circumstances of the case and may in its discretion, order the discharge of the whole of the forfeited recognizance or sum of money paid or to be paid in lieu or satisfaction thereof, and make such order thereon as to such Court appears just; and such order shall accordingly be a discharge to the sheriff or to the party according to the circumstances of the case.

The decision in the case of *Hopfe v. The King*, reported in 22 Canadian Criminal Cases, p. 116, will make this point quite clear. It reads as follows:—

"Where an order has been made estreating bail and for a writ of *fi. fa.* and *capias*, the Court before which the writ is returned for further disposition of the matter, may, with the concurrence of the Judge who made the order, set aside the same, and the writ issued thereunder, if it appears that the bail was taken by justices in a case in which they had no jurisdiction to bail and that the estreat order was in consequence made improvidently."

(See *Re Hopfe's Bail*, 10 D.L.R. 216, 22 Can. Crim. Cas. 116, 23 W.L.R. 751.)

This is the law which prevails in all the provinces of the Dominion, except Quebec.

Let us now look into the law which on this subject was enacted to be applied exclusively to our own province.

That law is to be found in article 1113 and following, down to article 1119 in the Criminal Code, and in article 3393 down to article 3400 of the Revised Statutes of Quebec.

There are two modes by which, in the Province of Quebec, the amount mentioned in a forfeited recognizance may be collected at the suit of the Crown. The first one is by means of a judgment *ex parte* based upon the estreated recognizance en-

tered up in the books of the Superior Court, as provided for by article 1115 of the Criminal Code and 3396 of the Revised Statutes of Quebec.

The second mode is by a direct action before the same Court, taken out at the suit of the Attorney-General of Canada or of Quebec, or of other person or officer authorized to sue for the Crown.

In each case the remedy which may be urged by the party sued varies accordingly to the mode adopted by the Crown, but should in either case be urged before the Superior Court.

Let us refer to each of those two modes separately.

Under the title head "Transmission of recognizance to Superior Court," article 1114 of the Criminal Code, contains the following disposition:—

“Such recognizance shall be transmitted by the Court, recorder, justice, magistrate or other functionary before whom the cognizor (or the principal cognizor where there is a surety or sureties), was bound to appear, or to do what by his default to do which, the condition of the recognizance is broken, to the Superior Court in the district in which the place where such default was made is included for civil purpose, with the certificate of the Court, recorder, justice, magistrate or other functionary as aforesaid, of the breach of the condition of such recognizance, of which, and of the forfeiture to the Crown of the penal sum therein mentioned, such certificate shall be conclusive evidence.”
(See art. 1114, Crim. Code, and 3395, Revised Statutes.)

It will be observed that this article makes no distinction between one Court or another. It applies equally to the Court holding the assizes or to the recorder's Court or that held by a justice of the peace.

This first step taken, what is next to be done by the prothonotary of the Superior Court?

Under the heading, "Judgment to be entered," article 1115 will make quite clear the answer to this query:—

“Article 1115. The date of the receipt of such recognizance . . . and certificate by the prothonotary of the said Court shall be entered thereon by him, and he shall enter judgment in favour

of the Crown against the cognizor for the penal sum mentioned in such recognizance, and execution may be reckoned from the time the judgment is entered by the prothonotary of the said Court." (See article 1115, Crim. Code, and 3398, Revised Statutes.)

Article 1115 does not say that the prothonotary shall register or enter the judgment or a judgment already pronounced by some other Court or Judge against the principal party and his sureties, but it says that said prothonotary shall enter judgment in favour of the Crown against the cognizor for the penal sum mentioned in the recognizance. It is only after the entering of such judgment that said recognizor becomes the debtor of the Crown, as I have already shewn by the authorities I have cited above.

The same article 1115 tells us that under the authority of this judgment, execution may issue after the same delay as in other cases from the date of said judgment, and article 1117 explains that when sufficient goods and chattels, lands and tenements are insufficient to satisfy the judgment, upon a return to that effect made to the Court by the sheriff, the defendant may be lodged in the common gaol of the district until satisfaction is made or until the Court which issued such warrant, upon cause shewn, as hereinafter mentioned, makes an order in the case, and such order has been fully complied with.

Now follows the remedy just referred to, which is given to the defendant against the certificate of default and the forfeiture when such certificate has been given either upon an error of fact or a misconception of the law. It is to be found in sub-section 3 of the same article 1117 of the Criminal Code.

"3. On petition of the cognizor of which notice shall be given to the clerk of the Crown of the district, the Court (that is to say, the Superior Court) may inquire into the circumstances of the case, and may, in its discretion, order the discharge of the amount for which he is liable, or make such order with respect thereto and to his imprisonment as may appear just, and such order shall be carried out by the sheriff."

Strange as the thing may appear at first sight, this sub-section 3, of article 1117, is not to be found in article 3397 of the

Revised Statutes of Quebec, which is the article corresponding to article 1117 of the Criminal Code. A moment's reflection, however, will easily lead to a proper explanation of this omission in the Revised Statutes. Any legist knows that the Parliament of Canada has no jurisdiction to enact laws on civil matters, and far less laws on civil procedure intended to be applied to the Province of Quebec. Laws of that description enacted by the Parliament of Canada can have no power nor authority in our province unless they have been re-enacted by our own legislature. Now, this is exactly what took place with regard to the seven articles of the Criminal Code which deal with the mode of collecting estreated recognizances by means of our Superior Court. When our own legislators saw this sub-section 3 of article 1117, they at once perceived that not only was said sub-section useless for the plain reason that our own Code of Procedure contained all the remedies required against *ex parte* judgments or judgments taken by default, but that it limited the mode of procedure allowed to the defendant and circumscribed it to a summary petition, when our own Code provides several other modes, some of which would be clashing with the one there suggested. For those reasons sub-section 3 was omitted, leaving the aggrieved defendant to the more logical remedies provided for under our own Code of Civil Procedure.

The second mode to be found in the Criminal Code is by means of a direct action taken out by the Crown against the cognizor either before the Superior Court or even before the Circuit Court. This is to be found in article 1114 of the Criminal Code and in articles 3398 and 3399 of the Revised Statutes of Quebec. This last article reads as follows: "In such case the sum forfeited by the non-performance of the condition of such recognizance shall be recoverable with costs, by action in any Court having jurisdiction in civil cases to the amount, at the suit of the Attorney-General or other party or officer authorized to sue for the Crown."

"In any such action," says the same article, "it shall be presumed that the party suing for the Crown is duly empowered to do so, and that the conditions of the recognizance were not performed, and that the sum therein mentioned is, therefore,

due to the Crown" (now comes the remedy in favour of the cognizor against a wrongful or illegal certificate of default) "unless the defendant proves the contrary."

From all those excerpts and citations of the law, I pretend to have demonstrated conclusively, (1) that in the Province of Quebec the modes provided for in favour of the Crown for the collection of the amount mentioned in recognizances in respect of which a certificate of default has been entered are entirely and absolutely different from that adopted and followed in the other provinces; (2) that in our province, two distinct modes are provided for in order to attain the same object, (1) by the prothonotary entering up a judgment *ex parte* or by default in the books of the Superior Court based upon the estreated recognizance and the certificate of default, against which judgment, the cognizor thus condemned, may seek redress by opposing any reasons which might justify him in praying for the setting aside of the judgment so pronounced *ex parte* or by default against him, (2) by the taking out by the Crown of a direct action either in the Superior Court or even in the Circuit Court according as the amount sought to be recovered would fall under the jurisdiction of either the one or the other of said Courts, and in the latter case, the cognizor (defendant in the suit) would again have the right to oppose such action by putting in a plea shewing that said direct action is unfounded either in fact or in law, and should not be maintained against him.

All this is so clear and so manifest that I cannot for a moment conceive how it may have been the occasion of any misconception or misapprehension on the part of any one.

It has been pretended at the argument that the certificate signed by the Court, Judge or magistrate was conclusive evidence of the breach of the condition of the recognizance and of the forfeiture to the Crown of the sum therein mentioned, and that such being the case, the circumstances under which said certificate was written could not legally be inquired into, nor questioned before the Superior Court. (See article 1114, Crim. Code, and 3395 Revised Statutes, P.Q.)

There is no doubt that the certificate in question is *prima facie* conclusive evidence as to the facts which it asserts; were it

otherwise, no sufficient proof would exist against the defendant, and as a consequence, no judgment could be entered up in the Superior Court against the alleged defaulting cognizor. But are we to conclude from that disposition of the law, that the certificate in question can in no way be impugned, nor set aside?

Article 1097 of the Criminal Code, which is one of the articles applicable to the Province of Quebec (sub-section 2), declares that such certificate is but *primâ facie* evidence of the non-appearance of the principal party to the recognizance or of his non-compliance with its condition. But there is a still more pre-emptory answer to such pretention.

Article 1119 of the Criminal Code and articles 3398 and 3399 declare in so many words that the amount of the penalty mentioned in the forfeited recognizance may be sued for by the Crown before the Superior Court and even before the Circuit Court and that in any such action it shall be presumed that the conditions of the recognizance were not performed, and that the sum therein mentioned is, therefore, due to the Crown, unless the defendant proves the contrary.

I have said above that under the system which the legislator has created for the Province of Quebec in matters of forfeited bail bonds, not only was the remedy sought to be obtained by the alleged defaulting cognizor to be applied for before the Superior Court, but that said Superior Court was the only tribunal by which said remedy could be granted. According to the system followed in the other provinces, which system I have fully explained above, the amount to be collected under a forfeited recognizance is assimilated to a fine, and is put upon a list or roll comprising all the fines, amercements which are due to the Crown and then is handed over for collection to the sheriff together with a *feri facias* and a *capias*, which process, after being executed, are returned before the Court from which they had been issued, and that upon said process being thus returned the aggrieved cognizor could obtain relief by applying by petition to the Court before which such return had been made, in other words before the Court which is in possession of the estreated recognizance.

Now, in the Province of Quebec, could the party against whom default has been entered, or his sureties, seek their remedy before the Court by which such default was pronounced? Clearly not, and this for the plain reason that the estreated recognizance, including the certificate of default, is no longer in the possession of the Court before which the principal party was bound to appear. After said instrument has been estreated, or as article 1113 of the Criminal Code expresses it, has been withdrawn from the record or proceedings in which it then was, it is handed over to the Superior Court where it remains of record. It is not a certified copy of the recognizance nor of the certificate of default which are taken over to the Superior Court, but the original document itself, which, ever afterwards, remains there of record. (See article 1113, Crim. Code.) The writ of execution against the goods and chattels of the defaulting cognizor is issued from the Superior Court and is returned into the same Court after seizure and not before the Court of criminal jurisdiction from which, owing to the default of the principal cognizor, the recognizance was declared estreated. Therefore, it is before the Superior Court only that the remedy given to the party aggrieved can be applied for.

In the present case, though the proceeding resorted to by means of two joint oppositions to the four judgments mentioned above intermingled with Petitions in Revocation of judgment may perhaps appear to be rather ambiguous and even contradictory, still, I believe it to be sufficiently explicit to justify me in granting the prayer contained in the conclusions which I find at the foot of said pleadings.

The two joint oppositions to the judgments in question are, therefore, maintained, and I shall add to my judgment a recommendation to the effect that the costs of the joint opposants and joint petitioners be paid by the Crown.

Estreat set aside.

[COUNTY COURT OF THE COUNTY OF MIDDLESEX,
ONTARIO.]

BEFORE HIS HONOUR JUDGE MACBETH.

SMITH v. GALPIN.

1. INTOXICATING LIQUORS (§ III A—56)—UNLAWFUL SALES—SHOP LICENSE—
MINIMUM QUANTITY IN UNBROKEN PACKAGES.

The holder of a shop license under the Liquor License Act (Ont.) is improperly convicted of selling a less quantity than three half-pints of liquor in a broken package on filling the buyer's order for a half-pint of rum and a half-pint of gin to be mixed together, where there was no appropriation of the goods to the sale or passing of the property therein to the buyer until the bottle, supplied by the seller as a container of the liquor ordered, had been securely corked and handed to the buyer; such bottle is an "unbroken package" under sec. 2 (n) of the Liquor License Act, sale of which by a shop licensee is authorized to a minimum of one half pint.

[*Pletts v. Beattie*, [1896] 1 Q.B. 519; *Jones v. Sherrington*, [1908] 2 K.B. 545; *Nobbett v. Hopkinson*, [1905] 2 K.B. 214; and *McGregor v. Whalen*, 31 O.L.R. 554, referred to; and see *R. v. Clarke*, 20 Can. Cr. Cas. 486, and note on appropriation of goods on sales of intoxicating liquors, 6 Can. Cr. Cas. 207.]

DECIDED: December 1, 1914.

APPEAL by Smith from a summary conviction under the Liquor License Act.

The appellant was, on the 14th day of October, convicted by the police magistrate of the city of London for that he, the appellant, being the holder of a shop license, did unlawfully sell a less quantity than three half pints of liquor in a broken package, thereby selling without the license by law required, contrary to the Liquor License Act. The appeal is from this conviction.

J. Haverson, K.C., for appellant.

McKillop, for respondent, the license inspector.

JUDGE MACBETH:—By sec. 2 (n) of the Liquor License Act, a shop license shall mean a license for selling by retail in shops or places other than taverns, in quantities of not less than three half pints, or if sold in unbroken packages of not less than one half pint at any one time to any one person, etc. The words "or if sold in unbroken packages of not less than one half pint" were introduced by amendment in 1897.

It would seem that the first thing to be done is to ascertain,

if possible, what is meant by an "unbroken package," as the Act does not give any definition of this term. By C.S.U.C., ch. 54, sec. 249, no tavern or shop license shall be necessary for selling any liquors in the original packages in which the same have been received from the importer or manufacturer, provided such package contains not less than 5 gallons, etc.

This is re-enacted in 29-30 Vict. ch. 51, sec. 252. By sec. 43 (1) of the Liquor License Act, no shop license shall be granted to sell liquor in any shop . . . where . . . merchandise other than mineral or aerated waters not containing spirits, ginger ale, liquor cases or taps is sold or exposed for sale.

But (a), nothing in this sub-section shall prevent the holder of a shop license from keeping and selling cigars in unbroken packages of not less than 50 cigars or 50 cigarettes or 5 pounds of tobacco: sec. 43 (2). The aforesaid mineral or aerated waters or ginger ale shall only be sold in original packages.

As cigars, cigarettes and tobacco are required to be put up in packages by the manufacturer and have a government stamp upon them, it follows that the packages of these which may be sold by the holder of a shop license must be original and unbroken packages.

Turning again to the Liquor License Act, we find, in sec. 157 (2), that the holder of a brewer's or distiller's warehouse license may keep a warehouse for the storage of unbroken packages of beers or spirits manufactured by him, and, by sub-sec. 2 of that section, no premises wherein is kept any broken package of liquor shall communicate with any brewery or distillery by any entrance.

By sec. 170 a wholesale license shall be granted only to a person who carries on the business of selling by wholesale or in unbroken packages, etc.

In part III. of the License Act, by sec. 174 (c), "original and unbroken package" shall mean the package in which the patent or proprietary medicine is put up by the manufacturer. Section 175 refers to the sale of liquor for strictly medicinal purpose in packages of not more than 6 ounces at any one time, and sec. 178 refers to the sale of patent or proprietary medicines in original and unbroken packages.

Comparing these various terms, I think it impossible to hold that the words "unbroken packages," as applied to packages

containing liquor, have the same meaning as "original packages" or "original and unbroken packages" or "original packages in which the liquors were received from the importer or manufacturer." Very obvious is the intention of the Legislature in enacting that the holder of a shop license shall sell aerated waters only in original packages, or that the druggist shall sell patent medicines containing alcohol only in original and unbroken packages in which the same were put up by the manufacturer. And equally obvious is the object of requiring liquors in small quantities for consumption off the premises is to be sold in unbroken packages. The object, of course, is to prevent consumption in the licensed shop, which is reasonably supposed to be more probable in the case of a purchaser of one half pint than in the case of a purchaser of three half pints or other larger quantity. Therefore, the sale of a quantity not less than one half pint is licensed only if the liquor be sold in an unbroken package, which is not necessarily either an original or an original and unbroken package. In other words, the holder of a shop license may buy liquors in barrels or otherwise and put it up for sale in unbroken packages containing not less than one half pint, and sell the same for consumption off the premises.

Judd, P.M., so held in the case now before me, and Dumble, P.M., at Peterboro, gave a decision to the same effect last year. Mr. McKillop, counsel for the respondent (who is the License Inspector), states that the License Department did not accept as correct the decision of the learned magistrates on the point, but he declined to offer any argument against its correctness. I need only say that on this point I agree with the magistrates. It is, however, conceded by Mr. McKillop—very properly, in my opinion—that a bottle securely corked is an unbroken package, assuming, of course, that an unbroken package is not necessarily an "original and unbroken" package, as I have already held.

I now come to the evidence on which the appellant was convicted. There is no doubt about the facts. A witness for the prosecution went into the appellant's shop and asked for a half pint of rum and a half a pint of gin, to be mixed together. The appellant's clerk took a pint bottle, put into it a half pint of rum from one barrel and a half pint of gin from another barrel,

corked the bottle securely, handed it to the witness, and received payment for it. Another transaction in all respects identical took place later on the same day, a second witness being the purchaser. The two bottles so purchased were produced before me in the same condition as when received from the appellant. Each contains one pint of a mixture of gin and rum. Each is securely corked, and in my opinion each is a pint of liquor in an unbroken package.

In his reasons for his decision the learned magistrate said:—

“In addition to considering the condition of the package delivered and the manner in which it was delivered, I think there must also be considered what the purchaser asked for and what the vendor gave him in response to his request. It is the sale, which of course includes the delivery, which the Act prohibits. It may be asked whether it makes any difference whether the liquor is put into a bottle one minute or one day before it is handed to the customer. My answer is that the only difference would be in enabling the magistrate to determine whether the liquor was being sold from the barrel or as a flask of liquor . . . I have not much hesitation in declaring that in my opinion the defendant's clerk sold two half pints of liquor one from each barrel, and put it (*scil. then*) into the bottle for the purpose of convenience in carrying it away . . . If the bottle which was handed to these witnesses on each occasion had been on the shelf of the defendant's store when they came in and had been taken down from the shelf and handed to them directly, I do not think there would have been a breach of the Act; it would simply be a sale of a pint flask of liquor in an unbroken package.”

(It may not be material, but I would note in passing that it would seem to be more accurate as well as more fair to say that what the witness in each case asked for and obtained was a pint of liquor composed in equal quantities of rum and gin.)

By sec. 1 (1) of the Sale of Goods Act, 1893 (Eng.), “a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to a buyer for a consideration called the price.”

Section 1 (3): Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale.

By sec. 18, Rule 5: Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state and unconditionally appropriated to the contract either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation has been made. And "deliverable" means in such a state that the buyer under the contract would be bound to take delivery of them.

In *McGregor v. Whalen*, 31 O.L.R., at p. 554, Riddell, J., points out that sec. 18, rule 5, was merely declaratory of the existing law. And the same may be said of the definition in sec. 1, as will appear by reference to any edition of Benjamin on Sales prior to 1893.

There is nothing in the Liquor License Act which is in the slightest degree at variance with the definitions cited from the Sale of Goods Act. Section 100 refers only to the proof of a sale under the Act, and dispenses with evidence that money actually passed if the magistrate be satisfied that a "transaction in the nature of a sale" actually took place.

Two fairly recent English cases deal with the question as to the exact time when a sale of liquor (*i.e.*, a transfer of the property in the liquor) from seller to buyer takes place.

In *Jones v. Shervington*, [1908] 2 K.B. 545, the facts were that a girl under fourteen was sent to a public house with a bottle to be filled with beer. The barman filled the bottle, but corked and sealed it properly before returning it to the child.

By the Intoxicating Liquors (sale to children) Act, 1901, sec. 2, any holder of a license who knowingly sells or delivers any intoxicating liquor to any person under fourteen, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels, shall be liable to a penalty.

Lord Alverstone said (p. 545): "The respondent's counsel raised the further point that the offence was complete when the beer was put into the bottle, because, as he contended, the property

then passed. This may be so, if the technical question of when the property passed be considered." But the learned Chief Justice went on to point out that, for the purpose of dealing with offences under the Licensing Acts, we have to look at the object of the particular enactment and the whole transaction, and if the beer was never delivered to the child otherwise than in a corked and sealed bottle, it is quite immaterial whether in law the property passed at an earlier stage.

In *Nobbett v. Hopkinson*, [1905] 2 K.B. 214, (as in the case now before me) the liquor was put in the seller's bottle. The facts are set out in the following citation from Lord Alverstone's judgment, at 218:—

"It appears that two men went to the respondent's public house on Saturday and asked for half a gallon of beer, and asked if it could be sent down to them on Sunday morning; the inference that I think may be properly drawn from this is that they would not have ordered the beer if they could not have had it sent to them on that Sunday. They then paid for the beer, which was drawn and put in a bottle; then, as the case states, the bottle was put on the bar counter, whence it was taken to the brewhouse stable (which was within the curtilage), and remained there until the Sunday morning, when it was given to the barman behind the counter to hand to the two men when they called for it. As a matter of fact the barman seems to have taken it off the premises himself and gone with it to the place where the two men were when he was stopped by the constable. There was, in my opinion, no evidence that what was done with the beer on the Saturday evening was done under the license or with the authority of the purchaser; the evidence seems to shew that it was done by the vendor on his own responsibility; and if the bottle of beer had been broken during the Saturday night, other beer would have had to be supplied to the men on the Sunday morning. I think, therefore, that there was not sufficient evidence on which it could properly be found that there was an appropriation of the beer on the Saturday night; I mean of an appropriation made by the respondent as the agent of the purchaser."

Kennedy, J., said (p. 221): "I think it is beyond all doubt that if the beer had been spilt or otherwise disposed of before delivering to the purchaser, the respondent could not have claimed to retain the money on the ground that the purchaser had consented to the beer in the particular bottle being set aside for him over night and that it was at his risk; it is clear that no property passed; there was no acceptance of the beer poured into that particular bottle."

Ridley, J., agreed that there was no appropriation on the Saturday. He thought that if there had been an appropriation on the Saturday the transaction of sale was at an end, and the delivery on the Sunday formed no part of it; the case would then be within *Pletts v. Beattie*, [1896] 1 Q.B. 519. The other two Judges thought that on the facts stated the delivery on Sunday was a material part of the contract of sale, but, as I have said, they also held that there was no appropriation and consequently no sale on Saturday. The Justice has acquitted the respondent on the ground that the sale took place on the Saturday, but their decision was reversed by the Q.B.D.

In the case now before me it is clear that the property in the liquor did not pass from the seller to the buyer until the seller's clerk appropriated the bottle containing it to the contract with the express or implied assent of the buyer by offering it to him or putting it on the counter for him. If in corking the bottle the clerk had broken it and spilt the liquor, the loss would have fallen on the seller. And, when such appropriation was so made, it is agreed that the bottle was securely corked, and the learned magistrate and I agree that a pint bottle securely corked is an unbroken package containing a pint of liquor. On such appropriation being made the property passed, and then and not before there was a sale of the pint of liquor in the unbroken package.

With great respect, therefore, I am unable to conceive in the reasons given by the learned magistrate for his finding that the appellant under the circumstances sold less than three half pints of liquor in a broken package.

I have already referred to the object of the enactment requiring sale of small quantities of liquor to be made in unbroken packages, and it seems to be that the intention of the Legislature is fully carried out if at the time when the purchaser of the half pint or

pint of liquor becomes the owner of it, *i.e.*, if at the time when the property therein passes, under the contract of sale to him, the liquor is in an unbroken package.

It is unnecessary for me now to consider whether for the offence with which the appellant was charged the minimum fine is \$20 or \$100. But, from what I heard on the argument of the appeal, I was inclined to think that Mr. Judd's view of the question is supported by the authorities.

Appeal allowed and conviction quashed

[SUPREME COURT OF ALBERTA.]

BEFORE HARVEY, C.J.

WAH KIE v. CITY OF CALGARY AND CUDDY.

1. GAMING (§ I—6)—MEANS OF RESISTING POLICE SEARCH—(COMMON GAMING HOUSE—CR. CODE SEC. 641.—

Where windows are barred and special efforts made to hide what is going on in a building used by Chinamen as a club-house in which it was rumoured gambling was being carried on, such cause of suspicion may be shewn in justification of a warrant of search under Cr. Code sec. 641 in a civil action against the chief constable; it is not a sufficient ground for removing the suspicion or for shewing the grounds of suspicion unreasonable, to prove that only members of the club had access to the premises, and this apart from any necessity for finding that there had been any infraction of the law in the manner of conducting the club.

[*R. v. Hung Gee*, 21 Can. Cr. Cas. 404, 13 D.L.R. 44, cited; and see *R. v. Jung Lee*, 22 Can. Cr. Cas. 63, 13 D.L.R. 896, 5 O.W.N. 80.]

DECIDED: May 14, 1914.

ACTION against a municipality and its chief constable for damages for trespass in respect of the execution by the latter of a warrant to search an alleged gaming house. See *R. v. Hung Gee*, 21 Can. Cr. Cas. 404, 13 D.L.R. 44, where convictions in respect of the same matter were set aside. An injunction was also asked to restrain further trespass.

A. A. McGillivray, for the plaintiffs.

C. J. Ford, for the defendants.

HARVEY, C.J., said, after reviewing the facts: We all know that certain classes of crime are difficult to obtain evidence in respect of, and artificial rules have been adopted by parliament and the legislature, to furnish evidence so as to practically throw the burden on those doing certain things to prove that they are doing what they have a right to do. This is one of the sections of that character, the power given for a search warrant is another extraordinary provision given in respect to this same class of crime, and it is given for the same reason. It must be exercised with discretion, but the power is there to exercise it, and the Court has to enforce it. The Court must enforce the laws as they are declared by the proper legislature. It appears that there was plenty of evidence here which was before the Chief of Police from his own visit to this place, and other reports which he received, which would have been sufficient, if brought before the police magistrate, on a charge to justify a conviction under the Act, and therefore quite amply sufficient to warrant the belief that the place was a common gaming house. I do not find that it was; that is not necessary for me in this case. It may have been that the gambling here was perfectly innocent. The Code only prohibits gambling under certain conditions, and if people want to gamble under other conditions they may do so. If people are doing what is lawful there seems to be no reason why they should hide it, or attempt to prevent observation by those who ought to be able to see everything that is going on in order to enforce the law. The bars on the windows in this case, and the other means of keeping people out, are suspicious; and the attempt made to justify part of that on the ground that only members have a right in there does not appear to me to be a sufficient explanation, nor sufficient ground for removing the suspicion which would naturally be attached to such a case. If the people who frequent this place are doing nothing but what they have a right to do under the law, then they should do it openly, and not attempt to do it secretly. That always tends to create suspicion, and if people do acts that cause suspicion to fall upon them they must naturally expect to suffer for them.

We come then simply to the manner of the execution of the

warrant, and in that respect I think there is no ground for complaint. It might be taken almost as an axiom, that if you want to detect people in the commission of crime you must take them unawares. The evidence is that the police knocked on the door, and I should think that would be an unwise thing to do. I should think, under those circumstances that they would be well advised not to make any unnecessary noise, but when they found the place locked, would break in, using such force as would be reasonably necessary for that purpose. The evidence does not satisfy me that there was any force used that was unnecessary here, and I think there is no ground for the action in that respect. The action will be dismissed with costs.

Action dismissed.

[COURT OF REVIEW, MONTREAL.]

BEFORE DELORIMIER, MARTINEAU AND GREENSHIELDS, JJ.

RICHARD v. GOULET.

1. MALICIOUS PROSECUTION (§ III—20)—TERMINATION—QUASHING ON TECHNICAL GROUNDS.

There must be a final termination of the prosecution in favour of the accused before he can maintain an action against the informant for malicious prosecution; such termination means a final judgment discharging the accused as innocent and not merely by the quashing of the indictment on account of a technicality or irregularity apart from the merits.

[Compare *Mortimer v. Fisher*, 11 D.L.R. 77; *Cockburn v. Kettle*, 12 D.L.R. 512; *Fancourt v. Heaven*, 18 O.L.R. 492; *Baxter v. Gordon*, 13 O.L.R. 598; *Pearce v. Street*, 3 B. & Ad. 397.]

2. CRIMINAL LAW (§ II F—65)—NOLLE PROSEQUI—EFFECT.

The entry of a "*nolle prosequi*" may be a termination of the prosecution in favour of the accused for the purposes of his action for malicious prosecution where not entered on account of an irregularity or technicality.

3. MALICIOUS PROSECUTION (§ II A—10)—REASONABLE AND PROBABLE CAUSE—ADVICE OF COUNSEL.

The fact that the informant who was afterwards sued for malicious prosecution had first consulted counsel and laid all the facts before him and had been advised by such counsel to lay the information is not in all cases a bar to the action being maintained, but is to be considered in determining the questions of malice and want of reasonable and probable cause.

[*Ravenga v. Macintosh*, 2 B. & C. 693, doubted.]

4. MALICIOUS PROSECUTION (§ III A—10)—TRUE BILL FOUND—EFFECT ON SUBSEQUENT ACTION FOR DAMAGES.

Where counsel's advice to the prosecutor upon the true facts fully laid before him to lay an information for a criminal offence is acted upon by the prosecutor and this is followed by a committal for trial and the finding of a true bill upon such facts, the prosecutor, against whom no express malice is shewn, is justified in his prosecution although a conviction is not secured; and a verdict for damages for false arrest and malicious prosecution will not under such circumstances be supported.

5. INDICTMENT, INFORMATION AND COMPLAINT (§ II F—55)—IRREGULARITY OR INSUFFICIENCY—AMENDMENT.

An indictment purporting to charge an offence under Cr. Code sec. 536, sub-sec. (b), in laying out poison, but which charged that the poison was wilfully placed in such a position as to be easily partaken of by "animals" instead of by "cattle" (Code sec. 536), should not have been quashed on defendant's motion, but should have been amended or a new indictment in due form preferred.

DECIDED: March 18, 1914.

APPEAL from the judgment at trial before Dugas, J., whereby the action was maintained and damages in the sum of \$200 awarded to the plaintiffs (husband and wife with community of property) in respect of alleged false arrest and imprisonment of the female plaintiff on a charge of wilfully placing poison in such a position as to be easily partaken of by animals in contravention of sec. 536 of the Criminal Code, 1906. Sub-section (b) of sec. 536 makes it an indictable offence wilfully to place poison in such a position as to be easily partaken of by "any such animal," i.e., any "cattle or the young thereof," mentioned in sub-sec. (a).

The accused had been committed for trial by a magistrate on the information lodged by Goulet but had been admitted to bail and after numerous renewals of bail for lack of a session of the King's Bench in the district of Joliette, an indictment was found against her in the year 1910. That indictment was quashed on the ground that it disclosed no offence inasmuch as the word animals (*animaux*) was used instead of cattle (*bestiaux*) as having been endangered, and the prisoner discharged.

The defendant who had laid the information pleaded that the indictment had been quashed on a technicality because of an error by the Crown officer who had prepared it for which he was not responsible, and that there had been no termination of the prosecution in favour of the accused to entitle her to maintain the action. This plea had been overruled in the Court below. The appeal from that judgment was allowed by the Court of Review, and the action for damages dismissed.

Letellier and Ladouceur, for plaintiff.

L. Ducharme, for defendant.

MONTREAL, March 18, 1914.

The opinion of the Court was delivered by

GREENSHIELDS, J.:—Before considering the evidence made before the learned trial Judge upon the issues as joined, there is a serious question to be decided.

In the afternoon of the 28th of August, 1904, the defendant saw a quantity, more or less, of Paris green on the property of the plaintiffs near the fence separating the respective properties of the parties: on the defendant's property were some domestic animals. Seeing this Paris green there, he consulted his lawyer. It should have been stated that some difficulty had arisen a few days before between the plaintiffs and the defendant, arising out of the fact that the hens belonging to the plaintiffs had wandered into the grain fields of the defendant. Seeing this Paris green there, as he says, mixed with grain and potatoes, he consulted his lawyer, and his lawyer advised him to take a witness and notify the male plaintiff to cause this Paris green to disappear. The defendant returned to his home, took his neighbour, one Gareau, and sought out the male plaintiff, and pointed out the presence of this Paris green to him, and told him he would have to cause it to disappear. The male plaintiff expressed some surprise at seeing it there, and stated he had no idea who had put it there, but then and there buried it in the earth and covered it up.

The female plaintiff was not present, but before the defendant and his witness, Gareau, left, the female plaintiff asked her husband what these men were doing there, and what he was doing. Apparently he told her, and she, I think it is clearly proven, said: "If I had been there it would not have been removed. I put it there, and I will put it there again."

If it be true she said this, she carried out her threat to some extent at least. This occurred on Sunday. The following morning the defendant again saw a platter or plate on top of a pile of wood supported by the separating fence, again containing a more or less quantity of Paris green. He again went to his lawyer, and his lawyer studying his Criminal Code, advised him to lodge a complaint under sec. 500 [Code of 1892, now sec. 536 of the 1906 Code]. Hence the complaint. The preliminary investiga-

tion was heard before Mr. H. Lanctot, who then occupied the position of District Magistrate for the District of Joliette, and who is now Magistrate in the City of Montreal. The complaint, the present defendant, was examined, and called witnesses in support of his complaint.

The female plaintiff (the then accused) made her voluntary statement, and elected to examine witnesses, and did examine witnesses before the Magistrate, without hearing all the proof offered on both sides, came to the conclusion that a *prima facie* case had been made out, and committed the female plaintiff (then accused) for trial before the Court of King's Bench; at the same time accepting bail, which bail was from year to year renewed, there being for six years, at least, apparently, a dearth of criminals in the District of Joliette, and owing to that dearth of criminals no Court of King's Bench convened.

In the month of September, 1910, apparently there had been gathered together a sufficient number of criminals to warrant the summoning of Grand jurors, and a panel of Grand jurors was summoned and empanelled, and, among other indictments, the indictment against the then accused, now the female plaintiff, was preferred.

The complaint upon which the committal intervened was in the terms of the statute. The learned Crown prosecutor, however, in uttering the indictment, for some reason best known to himself used the word "*animaux*" instead of "*bestiaux*," as used in the Code, and in that form the indictment went before the Grand Jury, and upon that indictment they found a true bill.

A motion was made to quash, and the motion was granted. The motion was opposed by the counsel for the Crown. It does not appear whether it occurred to the counsel for the Crown, or to the learned trial Judge, that an amendment could have been made to the indictment, if any amendment, indeed, was necessary.

That the indictment could have been amended, if necessary, and should have been amended if, indeed, it was necessary, there is no doubt. The irregularity if there was any, did not make to the substance of the offence, in the sense of precluding the possibility or the legality of ordering an amendment. However, none was made, and the indictment was quashed for the time being, at least; the person charged was liberated, and her sureties or bondsmen discharged.

Now it is clear that there was not a final termination of the prosecution. It would have been quite within the powers of the Court to order another and proper indictment to be preferred before the Grand Jury. The accused had never pleaded over the indictment, and of course had never been put upon her trial. However, neither the Crown, nor the defendant, the private prosecutor, if he can be so called, suggested the preferment of a new indictment, and so the matter rested until the 15th of March, 1911, when the present action was brought.

Now, the serious preliminary question is: The magistrate having committed the accused for trial after a full hearing, and after the accused had seen fit to call witnesses, and a true bill having been duly found upon the indictment, what proof is necessary on the plaintiffs' part to maintain the present action?

The answer, I take it, may be found either in the French or the English law. I do not think that much difference will be found in the practical application of either systems of law. It is said in English law that an essential ground of this action is, that a legal prosecution was initiated and carried on without probable cause (*Sutton v. Johnson*, 1 T.R. 493 and 510 (in Error)); secondly, it was stated that from want of probable cause, malice may be implied; but it was added, that from the most express malice want of probable cause cannot be implied; in other words, a man may have a spite or hatred against another, and may wait for an opportunity to vent his spite or hatred against the other, but if the other by his acts gives reasonable and probable cause, then, even the malicious prosecutor will be protected.

In *Sutton v. Johnson*, 1 T.R. 493 and 510, the defendant was the plaintiff's superior naval officer. The plaintiff was in command of a ship of war, actually engaged in war. The plaintiff received an order from his superior officer to advance his ship; the ship was disabled; it was physically impossible to obey the order, and it was disobeyed. He was placed under arrest, and was kept in confinement for three years, and was finally discharged by proper authority, on the ground of the impossibility of obeying the order. An action in damages followed. The defendant was condemned in a large amount of money. On a writ of error the Appellate Court reversed the judgment, and dismissed the action. The Court said that the plaintiff had been prosecuted for not

obeying an order. This amounted to a probable cause for the prosecution, and the fact that the plaintiff had a perfectly good reason for not obeying the order was absolutely immaterial.

Lord Campbell, in the case of *Broughton v. Dickson*, 21 L.J. Q.B. 256, said: "The defendant in an action for malicious prosecution should prove facts which would create a reasonable suspicion in the mind of a reasonable man."

Again, it was said: "Reasonable cause depends on the state of the defendant's mind and the information which is present to it at the time he institutes an action or starts a prosecution": *Dehgal v. Highley* (1837), B. & C. 950.

Now, as to the effect of a true bill. In *Saville v. Roberts*, it was stated: "4. If a bill of indictment has been backed by a true bill, the defendant in an action for malicious prosecution shall not be obliged to prove a probable cause, but the plaintiff must shew malice express."

In the present case, where the magistrate committed after contradictory proof was given, the accused having examined witnesses, and after a true bill was found upon a bill of indictment, it does seem to me that meagre proof of reasonable and probable cause, in the absence of proof of express malice, is a complete bar to the action. In this case twice the defendant consulted his counsel before instituting the prosecution, and laid all the facts before him and followed his advice.

In the case of *Ravenga v. Macintosh*, 2 B. & C. 693, 1824, Bailey, J., said: "If a party lays all the facts before his counsel, he is not liable to prosecution."

I should not perhaps be inclined to go to the full extent of this holding. If a person did consult his counsel, and he laid all the facts before him, but the magistrate refused to commit, I would hesitate to deny an action; but where the counsel's advice upon the facts is followed by the magistrate committing, after the facts are proven under oath, and the Grand Jury find a true bill, the defendant was justified in his prosecution.

The fact that the defendant did consult counsel is an important element in considering the state of mind that a reasonable person would have in the presence of the facts as presented to his counsel before the information was laid.

It is not suggested that the magistrate was actuated by im-

proper motives; it is not suggested that he was not a reasonable man; and if the facts were sufficient to induce him to take the serious step of putting the plaintiff upon trial for a serious offence, can it be said that the knowledge of the same facts existing in the mind of the defendant was not a reasonable and probable cause sufficient to induce any reasonable and prudent man to take the steps which the defendant did.

Now, further, there has never been, in my opinion, a termination of this prosecution. In the case reported it was stated that the plaintiff in an action of this kind must prove he was innocent, and that his innocence was pronounced by a tribunal before which he came, and he must shew want of a reasonable and probable cause.

Under the English jurisprudence, and under our jurisprudence, I should say that there must be a final termination of the prosecution before an action of this kind can be maintained. What is a termination of the prosecution? It is a final judgment discharging the accused, and declaring the accused innocent, and I should say that a liberation of the accused for the time being, without a declaration of his innocence, is not a termination. It has been held that an entry of "*nolle prosequi*" is a good termination, if the *nolle prosequi* is not entered on account of an irregularity or technicality. In like manner it has been held that an arrest of judgment after conviction is not a termination which would open the door to an action in damages.

In this case, by no judgment or verdict was the innocence of the female plaintiff declared; all that was declared was that the indictment was defective in form, and the accused was liberated from further answering to the said indictment. But an indictment in regular form could have been laid before that grand jury, or before any other grand jury.

The female plaintiff has not shewed that she has been declared innocent of the offence by any tribunal, and in the absence of that proof I do not believe her action can be maintained.

Appeal allowed.

[COURT OF APPEAL FOR BRITISH COLUMBIA.]

BEFORE IRVING, MARTIN, GALLIHER, AND McPHILLIPS, J.J.A.

REX v. SHAJOO RAM.

1. OATHS (§ I—2)—IN FORM CUSTOMARY WITH PERSONS OF WITNESS' RACE OR BELIEF.

When a witness without objection takes the oath in the form ordinarily administered to persons of his race or belief, he is under obligation to speak the truth under penalty of punishment for perjury, although there may not have been an invocation of a deity or any express admission by the witness that his conscience was bound.

[*R. v. Lai Ping*, 8 Can. Cr. Cas. 467, 11 B.C.R. 102, and *Curry v. The King*, 22 Can. Cr. Cas. 191, 48 Can. S.C.R. 532, 15 D.L.R. 347, applied.]

DECIDED: November 9, 1914.

CROWN Case reserved on an indictment for perjury.

R. M. Macdonald, for the prisoner.*A. Dunbar Taylor*, K.C., for the Crown.

IRVING, J.A. (dissenting):—In this case I have reached the conclusion that there was no proper oath administered. There is no indication whatsoever of a Deity being invoked. That invocation is essential to constitute an oath. Therefore the case in my opinion should be answered in favour of the prisoner.

It seems to me that this case shews a very loose and unsatisfactory way of doing business is permitted in the Police Court. It may take a little more time to do things properly and in order, but it is necessary that they should be done properly in order to be legal.

MARTIN, J.A.:—In my opinion the learned Judge of Assize was right in deciding on the evidence that a proper oath was administered in the Police Court. It is conceded that the witness was competent to take an oath. I pause here to say that there is no doubt that the words "You take your oath" were used, as will be seen by reference to page 14, where Ricketts, the interpreter, says what he told him was, "The oath that you take," so this clears up the doubt that was expressed by counsel for the prisoner as to whether the language really used was not "You eat your oath" (which appears on p. 5 of the case), suggesting

that it was used advisedly in accordance with some peculiar form of religious observance; it is clearly only an error of the stenographer.

I think in principle that this case is governed by the unanimous decision of the Full Court in *Rex v. Lai Ping*, 11 B.C.R. 102, 8 Can. Cr. Cas. 467, wherein all the four Judges agreed (including Mr. Justice Duff, now of the Supreme Court of Canada, my brother Irving and myself) that an oath administered to a non-Christian Chinaman was properly administered, though all he did after stating that he swore by burning paper after writing his name on it, was to write his name on a piece of paper and burn the same while being told "that he was to tell the truth, the whole truth, and nothing but the truth, or his soul would burn up as the paper had been burned." There was in this, be it noted, no invocation of a Deity or Supreme Power or statement that the witness's conscience was bound, yet the decision of the Court given at p. 106 in the language of the Chief Justice, with whom all agreed, is as follows:—

"It seems to me that when a man without objection takes the oath in the form ordinarily administered to persons of his race or belief, as the case may be, he is then under a legal obligation to speak the truth, and cannot be heard to say that he was not sworn. If we were to decide otherwise we would deprive the evidence given in a Court of Justice of the most powerful and necessary sanction which it is possible to give it, namely, the risk of a prosecution for perjury."

In the case at bar the prisoner said, through the interpreter (p. 5), "I take my oath to tell the truth and nothing but the truth," and also held up his hand at the time of so doing. It was not disputed that this is the "form of oath ordinarily administered to persons of his race or belief," and that fact further appears by the case before us containing part of the evidence on the trial in the Assize Court whereby it is shewn on p. 16 that the accused, and present appellant, himself was again sworn in the same way according to the "custom of his people" by putting up his hand and "affirming" as the interpreter loosely terms it, though he, of course, does not use that word in its real technical sense, as appears by his next remark: "He swears by putting his hand up. It is like affirming," and (p. 13) he says this is "the

usual oath;" also in answer to the learned Judge the interpreter stated that he had put the oath to the witness in such a way that it "would compel him to tell the truth." I attach no importance to the fact that the witness was not explicitly asked "if the oath in the form in which he took it was recognized by him as binding upon his conscience," because it is clear from the recent decision of the Supreme Court of Canada in *Curry v. The King* (1913), 48 Can. S.C.R. 532, 15 D.L.R. 347, 22 Can. Cr. Cas. 191, 50 C.L.J. 190, that it is not necessary so to do; I refer particularly to the judgment of Mr. Justice Anglin at p. 540. And in the case at bar such a question in those exact words could not have been asked or answered because we are told by the two interpreters that there is no such word as "conscience" in the witness's language. See Ricketts, p. 14, and Gwyther, p. 12; the latter says:—

"The word 'conscience,' well, I have never used it yet on a trial, and as far as I know, no one else knows how to put it to them. It is to be binding on them. It is to be binding on their conscience. It is one and the same thing. It is simply a translation of the one thing into the other."

In such circumstances all that it was possible to do would be to use such appropriate and equivalent terms as would bring home to the mind of the witness the fact that he was binding himself according to his moral sense to speak the truth. There are many words in many languages which cannot be directly or exactly expressed by those in other language, but the law does not allow justice to be defeated by requiring the performance of formal or technical linguistic impossibilities. Here the interpreter Ricketts says (p. 14), "I asked him the best way I could if that was binding upon his conscience," and again (p. 15), "I put it to him the strongest way I could," and as he speaks the language well what more could be expected? He said to the witness (p. 14), "The oath that you take is this binding on you?" and the witness replied that it was. Surely that can mean one thing and one thing only, that it was clearly brought home to the witness that he was bound by his moral sense, *i.e.*, his conscience (though that word could not be exactly employed) to tell the truth, and if he did not it would be wilful and corrupt falsehood. Accompanied as this statement was by the uplifting of the hand towards the heavens, a solemn and significant act inseparable in such circumstances from an intention to invoke a Deity supposedly therein dwelling,

and one for a great length of time associated with "the more ancient of the two forms known in modern proceedings, 'the adjuratory invocation of the Deity with uplifted hand commonly called the Scotch oath,'" as the Chief Justice of Canada puts it in *Curry v. The King*, 15 D.L.R. 347, 22 Can. Cr. Cas. 191, I have no doubt whatever that the conscience, as we call it, of the witness was duly bound. As the Chief Justice went on to say:—

"Having taken the oath in that form without objection, it is an admission that the witness regarded it as binding on his conscience."

It must be conceded that he was duly sworn according to the "form ordinarily administered to persons of his race or belief," because the evidence to that effect is uncontradicted, and therefore he could be convicted of perjury on this very oath which is here attacked if he were being tried in his own country, India, and yet it is said that he can escape that punishment on the same oath in this country! I confess I am unable to follow such reasoning. It is directly contrary to the decision in *Rex v. Lai Ping*, 11 B.C.R. 102, 8 Can. Cr. Cas. 467, which we are bound by and which has been followed for ten years and never questioned. The suggestion that the valid oath of a witness somehow loses its efficiency to bind him because he happens to change his residence to some other part of the Empire places so great a premium on perjury that I feel it should receive no encouragement from this Court. In the judgment of Mr. Justice Idington in *Rex v. Curry*, *supra*, there is a paragraph, the last, which contains expressions peculiarly appropriate to this case:—

"It is extremely desirable that men appearing as witnesses in our Courts and in such capacity taking any form of oath or making any affirmation, should understand they are, when wilfully and corruptly speaking falsely under any such circumstances, liable to be convicted of perjury, whatever may be their peculiar religious, mental or moral conceptions of the binding effect of the form of oath or affirmation."

With regard to the precautions taken by the magistrate, it appears to me that he took unusual care to satisfy himself by putting questions through the interpreter, in the way pointed out, to see that the oath he administered himself was properly put and that the conscience of the witness had as a matter of fact been bound (see case, pp. 5, 6 and 15), and two interpreters were used,

viz., Ricketts and a check interpreter, Gwyther, who is a Government interpreter of Hindu languages in the Canadian Immigration Department.

GALLIHER, J.A.:—While I take the view that on the whole greater care should have been taken in this case in the administration of the oath, I am inclined to think that the oath was sufficiently administered.

McPHILLIPS, J.A.:—I agree with my brother Martin. I merely wish to add, in dealing with people who do not speak the English language, no matter what language it may be, there will always be difficulty perhaps in rightly conveying, in apt words of that foreign language, the true meaning of what is a first essential in a British Court of Justice, and that is, that all evidence should be preceded by an oath or failing an oath, an affirmation, which is provided by statute.

Now, in this particular case upon the evidence I consider the stated case furnished to us shews that sufficient care was taken to properly convey and have portrayed to the mind of the witness what he was bound to do, and that was to take an oath under the law as we have it. I am the more impelled to come to this conclusion when I find that this witness when giving his evidence in the Assize Court also was sworn in the same manner, and, apparently was thought to have been sufficiently sworn there. It would seem to me that if we were to come to the conclusion that he was insufficiently sworn in the Police Court we would have to conclude that likewise he was insufficiently sworn in the Supreme Court. I think that that would hit very seriously at the administration of criminal justice, that there should be any requirement of a more strict nature than, apparently, followed out in the Supreme Court, and, I think, as well followed out in the Police Court. The whole question would be then: Did this witness come into the Court with the intention to take an oath which was binding upon him? And we have the natural response that would go with that, as it appears when he wished his evidence to be believed for the purpose of his exculpation, in the Supreme Court, he was sworn in like manner.

My conclusion, therefore, is that the question should be answered in favour of the Crown.

Judgment for the Crown.

[SUPREME COURT OF ONTARIO.]

(Appellate Division).

BEFORE MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, AND
HODGINS, J.J.A.**REX v. WILLIAMS.**EVIDENCE (§ XII A—920)—CORROBORATION — ACCOMPLICE — INDECENCY
WITH MALE PERSON—(C.R. CODE (1906), SEC. 206.

DECIDED: December 9, 1914.

CASE reserved and stated by the Senior Judge of the County Court of the County of Carleton, under sec. 206 of the Criminal Code.

The accused was tried on a charge of having committed an act of gross indecency with another male person during the month of February, 1914. There was a similar charge against the accused in respect of a brother of the same person, and a case was reserved by the learned trial Judge in respect of each charge, the following questions being submitted by him for the opinion of the Court:—

(1) Was the person with whom the offence was committed an accomplice?

(2) If he was an accomplice, was it essential to the validity of the conviction that his evidence should be corroborated?

(3) If corroborative evidence was necessary, was such evidence given?

J. A. Macintosh, for the accused, argued that in each case the boy with whom the alleged offence was committed was an accomplice and that his evidence required corroboration. The statements of the accused which are relied on by the prosecution were obtained by inducements held out to him, and should be disregarded, and the accused should have been warned. He referred to Russell on Crimes, 7th ed., p. 266; *Rex v. Everest* (1909), 73 J.P. 269; *Rex v. Winkel* (1911), 76 J.P. 191.

[MEREDITH, C.J.O., referred to *Lewis v. Harris* (1913), 30 Times L.R. 109].

J. R. Cartwright, K.C., for the Crown, was not called upon to argue, but admitted, in reply to a question from the Court, that the person with whom the alleged offence was committed was an accomplice. He referred in this connection to *Rex v. Frank* (1910), 16 Can. Cr. Cas. 237, 21 O.L.R. 196.

The judgment of the Court was delivered by MEREDITH, C.J.O., at the conclusion of the argument, holding that corroboration of the evidence of the accomplice in this case was not essential to the validity of the conviction, and that, even if corroboration were necessary, it had been supplied.

Conviction affirmed.

[SUPREME COURT OF ONTARIO.]

BEFORE LENNOX, J., IN CHAMBERS.

REX v. ROWENS.

1. BAIL AND RECOGNIZANCE (§ 1—3)—TREASONABLE OFFENCE.

A person committed for trial in time of war upon a charge of the treasonable offence of aiding the King's enemies to leave Canada, is properly refused bail.

DECIDED: December 17, 1914.

APPLICATION on behalf of the prisoner for bail.

T. H. Lennox, K.C., for the prisoner.

Edward Bayly, K.C., for the Crown.

LENNOX, J.:—The prisoner is a Russian, said to be well educated and of good antecedents and character. He is awaiting his trial upon a charge of treason, founded, it is alleged, upon his aiding and abetting the King's enemies in an attempt to leave Canada. It is argued that he is clearly not guilty, but, he having been committed, I must assume that there is at least a *prima facie* case, and he is charged with the commission of a capital offence of the gravest character known to the law. It

is not an extraditable offence; and, if it should turn out that he is guilty—an enemy of the Crown—there is no money compensation which could be regarded as the equivalent of the public injury resulting from his escape. He is of the nationality of one of our great Allies. Substantial bail has been offered, and I am inclined to believe that the application is made in good faith, and that he would await his trial. But this is a time of war, a time of great national stress and peril, when no chances should be taken; and, upon the whole, I do not think it prudent to accede to the application. The case can be brought to trial in January.

The application is refused. I make no order as to costs.

Bail refused.

[DISTRICT COURT OF PRINCE ALBERT, SASK.]

BEFORE HIS HONOUR JUDGE DOAK.

REX v. GEORGET.

1. APPEAL (§ III E—91)—FROM SUMMARY CONVICTION—"NEXT SITTINGS" UNDER CR. CODE SEC. 749.

Where, as in Saskatchewan, the regular sittings of the district court to which an appeal may be taken from a summary conviction, are fixed by provincial order-in-council and others known as special sittings are fixed by the judge by virtue of a provincial statute, a notice of appeal is valid if served for the special sittings being the first sittings following the expiration of fourteen days from the conviction; and *semble*, it would be competent for an appellant to give notice of appeal either to the next special sittings or the next regular sittings, either being the "next sittings" within a liberal interpretation of Cr. Code sec. 749.

2. APPEAL (§ III E—91)—FROM SUMMARY CONVICTION—NEAREST PLACE OF SITTINGS—DISTRICT COURT (SASK.).

The sittings of a district court which shall be held "nearest" to the place where the cause of the information or complaint arose and to which in Saskatchewan an appeal from a summary conviction is to be taken, means, *primâ facie* the nearest, measured in a straight line on a horizontal plane, but if it be shewn that another place for which a session of the court is fixed is more convenient of access, having regard to the recognized means of travel, the appellant will be deemed to have complied with Cr. Code sec. 749, if he brings his appeal either there or at the place which is nearest, when measured in a straight line.

[*R. v. Surrey*, 6 Q.B.D. 100; *R. v. Norfolk*, 99 L.T. 936, applied.]

DECIDED: December 22, 1914.

APPEAL from the decision of a justice of the peace whereby the appellant (defendant) was convicted of having on the first of August, 1914, at the post office of Domremy, Sask., assaulted the respondent.

Jas. McKay, K.C., for appellant.

F. W. Halliday, for respondent.

JUDGE DOAK:—When the matter came up before me certain objections were raised by the respondent's solicitor as to the sufficiency of the preliminary steps taken by the appellant to perfect his appeal, and as these questions seemed to me to be of some importance I reserved my decision upon them, and allowed the case to proceed upon the merits.

At the close of the case I intimated that I did not consider the justice of the peace to have been justified in finding the appellant guilty of the offence wherewith he had been charged, but that my decision in this respect must be subject to my findings upon the preliminary objections as, unless the appellant were properly before the Court, the appeal could not be heard upon the merits.

The two objections raised by the respondent are as follows:—

(1) That the notice of appeal was not made to a sittings of the Court, authorized by order-in-council, but to one fixed by myself as Judge of the District and was therefore irregular.

(2) That the appeal must be taken to the sittings of the Court nearest the place where the alleged offence took place; that the appeal should therefore have been to the next sittings at Duck Lake, instead of Prince Albert, and that the appeal could, therefore not be heard at Prince Albert.

The respondent's first objection is based upon sec. 749, sub-sec. 1 (f) of the Criminal Code which provides that the appeal shall be to the District Court at the sittings thereof nearest the place where the cause of complaint arose; and upon sec. 750, sub-sec. (a) which provides that the appeal shall be to the next

sittings of such Court, unless the conviction was made within fourteen days of such sittings.

Sec. 24 of the District Courts Act, R.S.S. ch. 53, provides that the Lieut.-Governor-in-Council shall have power to fix the times and places for the sittings of the Court. By virtue of this authority an order-in-council was passed on December 24, 1913, fixing the sittings of the District Court throughout the province including those for the Prince Albert District.

Now, the conviction in this case was made on the 23rd of September, 1914, and by the order-in-council above referred to the then next sittings at Prince Albert were fixed for the 5th of October, less than 14 days from the date of the conviction. The notice of appeal then, if given for the sittings at Prince Albert, would according to sec. 750, sub-sec. (a), have to be given for the next ensuing sittings which by the order-in-council were fixed for December 1st.

Section 25 of the District Courts Act, however, gives authority to the Judge of the District to appoint special sittings at any time and place within the District. By virtue of this authority I did, on the 2nd of February, 1914, appoint certain special sittings to be held during 1914, at Prince Albert, and one of the dates so fixed by me was November 5th. The appellant's notice of appeal was taken to the last-mentioned sittings instead of the one fixed by order-in-council.

Neither sec. 749 or 750 defines the meaning of the words "the next sittings," but the sittings fixed by me under the authority vested in me by the District Courts Act are just as much sittings of the Court as are those fixed by order-in-council. The provision of the Criminal Code which give the right of appeal should, I think, be given a liberal construction within the limits to which they apply, because these sections while forming part of a penal statute are essentially remedial in their nature.

I am of the opinion that where, as in the present case, a special sittings previously fixed by a Judge intervenes between the date of the conviction and the next sittings fixed by order-in-council, it would be competent for an appellant to give notice of appeal for either sittings, because both are "next sittings"

according to a liberal interpretation of the meaning of these words, one being the next special sittings and the other the next regular sittings.

The respondent's second objection is based upon sec. 749 of the Criminal Code, which provides that the appeal shall be to the sittings nearest the place where the cause of complaint arose.

The cause of complaint in this instance arose at Domremy post office. This particular place is shewn to be twenty and one-half miles, following the township lines, from Duck Lake where a sittings is appointed by order-in-council to be held on the fourth Tuesday in April of each year, and twenty-seven and one-half miles from Prince Albert following township lines. It is apparent, therefore, that Duck Lake is nearer in a straight line from the place where the cause of complaint arose, than Prince Albert is.

Following the ordinary travelled waggon trail the distance, though greater than by the township lines, is approximately the same to both places, although the road to Prince Albert is probably a more travelled and somewhat better route. A third method of transportation, and the one usually adopted, is to go by the road to Fenton a distance of some ten or twelve miles and there take the railway direct to Prince Albert.

This, although greater than any of the others in point of actual distance traversed, is by far the most accessible and convenient route, both because of the shorter distance by road, and because it does not involve the crossing of the South Saskatchewan river, a proceeding which is necessary in both other cases, and which, during certain seasons of the year, is impracticable.

The question before me then is, must I construe the word "nearest" as meaning the nearest point in a straight line, or as meaning the nearest point, having regard to its accessibility and the usual methods of travel?

In favour of the former view may be urged the fact that it fixes a definite and invariable rule to go by, while to adopt the latter construction would lead to doubts and uncertainty.

On the other hand, to adopt the former view would often lead, not only to inconvenience, but to positive hardship.

Thus, the sittings in Duck Lake take place at the last of April, a period when the Saskatchewan river is frequently impassible owing to the unsafe condition of the ice. The appellant would then be compelled to travel to Fenton by road and thence by railway through Prince Albert to Duck Lake, making a journey of nearly forty miles further than he would to Prince Albert.

Again, supposing the railway which is now in course of construction between Domremy and Prince Albert were completed, it would certainly be a hardship upon litigants to compel them to drive overland for twenty-five or thirty miles to Duck Lake when they could reach Prince Albert by a railway journey of a few miles more.

I have been unable to find any decision in the Courts of our own or any other Province of Canada which would be a guide in determining which interpretation should be adopted, but a somewhat similar question has been the subject of a number of decisions in England. The earlier cases of *Woods v. Dennett*, 2 Starkie 89, and *Leigh v. Hind*, 9 B. & C. 774, 7 L.J.K.B. 313, adopt the rule that the measurement should be according to the nearest available mode of access, but, in the later decisions of *Reg. v. Saffron Walden*, 15 L.J.M.C. 115, *Lake v. Butler*, 24 L.J. Q.B. 273, and a number of others, a contrary view is adopted. This later view was applied to the interpretation of statutes as well as contract in *Mouflet v. Cole*, 42 L.J.Ex. 8, and it is now settled law in England that where a statute is silent as to the method of measuring a given distance that measurement is to be in a straight line upon a horizontal plane.

The reasons which are assigned for adopting this rule are, that it affords a certain method, whereas any other would lead to doubt and confusion. Thus Lord Campbell, C.J., in *Lake v. Butler*, *supra*, says, "We may consider the legislature as implying that the most convenient and certain method of measurement should be adopted. If we are to take the nearest practicable mode of access what uncertainty will arise, but if we adopt the straight line no uncertainty can possibly arise." In the same case Coleridge, J., while expressing some doubts, admits that

the rule proposed on the other side is the most convenient and tends to obviate difficulties which would arise, according to any other method, as to the kind of road intended.

In *Reg. v. Saffron Walden, supra*, Lord Denman, C.J., says, "We are left much at large in the matter, for there are really no materials for us on which to form our judgment. Under these circumstances, it is best to adopt a fixed and arbitrary rule, and the most reasonable seems to be that suggested by my brother Parke." The rule referred to by Lord Denman in this case is the suggestion made by Parke, J., in *Leigh v. Hind, supra*, that distances should be measured "as the crow flies."

It must be borne in mind, however, that all of the English decisions which I have mentioned have reference to the measurement of an ascertained and fixed distance, and there appears to be no case where the Courts have been called upon to apply the rule to a question like the present one.

If the question which I have to determine were one of the jurisdiction of the Court within certain defined limits, say twenty-five miles from some common centre, then I think I would undoubtedly be bound to adopt the rule of construction above laid down as being the most certain and convenient.

Here, however, is no question involving the jurisdiction of the Court, for that jurisdiction exists equally in both places. It seems to me that in interpreting the clause in question we must not only look at the words in their literal sense, but must also consider the object which the legislature had in view in placing those words in the statute. This principle is concisely put by Channell, J., in *Reigate v. Sutton*, 99 L.T.R. 168, at p. 170, where he says, "Where the meaning of the words is absolutely clear beyond any doubt, the Court has no right to go beyond them. But when words are capable of one meaning and at the same time of a more extended meaning, whether they are to have the one meaning or the more extended meaning is to be dealt with according to what the Court sees to be the object and policy of the Act."

In *Stokes v. Grissell*, 23 L.J.C.P. 141, which is a case involving the measurement of distances, Maule, J., at p. 143, uses the

following language: "The words are quite unambiguous and to be construed in one sense only. That rule of interpretation is subject to this, that if that one sense would lead to some manifest inconvenience, then some other sense must be looked for because we are to presume that what is manifest would have been seen by those who drew the enactment."

The Courts in England, moreover, have not scrupled to extend the words of an enactment beyond their literal meaning where injustice would be occasioned by refusing to do so. Thus, by 13 & 14 Car. 2 ch. IV., an appeal was given in poor law removals to the next quarter sessions.

By a series of decisions which are all reviewed in *R. v. Surrey*, 6 Q.B.D. 100, 43 L.T. 500, the words, "next quarter sessions," were not given their literal meaning, but were interpreted as meaning the next practicable sessions."

This principle was reaffirmed as lately as 1908 by Lord Alverstone in *Rex v. Norfolk*, 99 L.T.R. 936.

The only decided case in England where the interpretation of the word "nearest" has been in question is in *Bathard v. London Sewers Commissioners*, 54 J.P. 135. In this case it is held that the words, "nearest sewer," are not to be taken in their literal sense, but as meaning the nearest sewer which a person, by exercising only his proprietary rights, can reach.

The object and intention of the legislature in enacting sec. 749 of the Criminal Code was, I believe, to prevent litigants from dragging their adversaries to a remote and inconvenient corner of the Judicial District, and I cannot think that it ever was intended to exact anything more than reasonable compliance with its provisions.

If, for instance, in a case where two places at which Courts had been appointed to be held, were nearly equi-distant and each equally convenient, an appellant who had just cause to complain of a conviction adjudging imprisonment were by inadvertence, or lack of means of knowledge, to take his appeal to the further place, it would, in my opinion, be monstrous to refuse to do justice and to thereby deprive the appellant of his liberty solely because the appeal should have been heard at a place

which turned out to be a few yards nearer the point where the cause of action arose.

In the present case I am of the opinion that, having regard to the usual travelled route, Prince Albert is a more convenient and accessible point than Duck Lake and that the appellant in bringing his appeal to Prince Albert has reasonably complied with the statute.

In view of the fact that this question is likely to arise from time to time, I think it would be as well to lay down some general rules with regard to what I consider would constitute a compliance with the provisions of this section, and these rules, I think, should be as follows:—

First, the word “nearest” in sec. 749, sub-sec. F. means, *primâ facie*, the nearest, measured in a straight line on a horizontal plane.

Second, if it can be shewn that another place, although more distant according to the first rule, is more convenient of access, having regard to the recognized means of travel, the appellant will be deemed to have complied with the Act if he brings his appeal either there or at the place which is nearest, according to the first rule.

I have already dealt with the present case on its merits and having now decided that the respondent’s objections to the sufficiency of the appeal cannot be sustained, I must find in favour of the appellant and order the conviction to be quashed.

The deposit made by the appellant, together with the fine and costs paid by him will be restored. The respondent must pay the costs of the appeal, such costs to be paid to the Clerk of the Court within twenty days after taxation.

Conviction quashed.

[DISTRICT COURT OF PRINCE ALBERT, SASK.]

BEFORE HIS HONOUR JUDGE DOAK.

REX v. LABRIE.

1. INTOXICATING LIQUORS (§ III C—65)—UNLAWFUL SALES—LIABILITY OF PRINCIPAL FOR OFFENCE OF AGENT.

The act of a bartender in selling liquor to Indians in contravention of the Indian Act, R.S.C. 1906, ch. 81, is one within the scope of his ostensible authority and the hotelkeeper who employed him may be convicted for it.

[*Police Commissioners v. Cartman*, [1896] 1 Q.B. 655, followed; *R. v. Gee*, 5 Can. Cr. Cas. 148, distinguished.]

DECIDED: December 2, 1914.

APPEAL from a conviction made by a police magistrate on August 5, 1914, whereby the appellant was convicted under sec. 135(a) of the Indian Act, R.S.C. ch. 81, of having sold liquor to a treaty Indian on July 15, previous.

JUDGE DOAK: As there is considerable conflict in the evidence I will deal with that first. According to the stories of the three Indians who gave evidence, they left the reserve near Duck Lake on the morning of July 15 and came to Prince Albert, where they had to wait several hours for a train to take them to their ultimate destination. Shortly after their arrival at Prince Albert they went to the Saskatchewan Hotel, of which the appellant is the licensee, entered the bar and purchased several drinks of beer from the bartender, and one of the three purchased a bottle of rye whiskey from him.

This story is contradicted by the bartender who swears positively that he never saw the three Indians in his life, that they were never in the bar of the Saskatchewan Hotel, and that he never served any liquor to any Indians on the morning in question.

He is corroborated by the evidence of two witnesses, Williams and Fox, who both swear that they were in the bar on the morning when the offence is supposed to have been committed, at

... they were there and for some time
 consequent thereto, and that during all the
 ... neither these Indians nor any others were

... why I would be disposed to believe the story
 ... the Indians are, that, in the first place, the Saskatchewan
 ... being just across the street from the station, is the one
 ... where these Indians would be most likely to go in their
 ... for liquor, and indeed it is more than probable that the
 ... of the hotel with the sign "bar" in one of the windows
 ... first put the idea into their heads. In the next place they would
 ... have no particular object in bringing an accusation of this kind
 ... against the hotel or the bartender, a man whom they did not
 ... know at all. And yet they identify both the hotel and the bar-
 ... tender in the most positive way.

I am satisfied, moreover, from their demeanour in Court that
 they were much too frightened to tell a false tale, even if they
 had possessed the mental ability to concoct one. As against this
 we have the evidence of the bartender backed up by that of a
 couple of habitués of the hotel bar.

Now, I do not wish to be understood as condemning as a class
 those who follow the trade of a bartender. There are without
 doubt many honest men among them, men who endeavour to,
 and who do live up to the law in every respect. But I have
 found from my own observation that men of his class who have
 the misfortune to be brought before the Courts for breaches of
 the liquor laws can, where they desire to do so, usually find some-
 body or other ready to come forward and swear to anything and
 everything necessary to enable them to escape.

For this reason where, as in the present case, the evidence on
 behalf of the accused is in direct contradiction to the story told
 by the Indians, a story which, in my opinion, bears all the ear-
 marks of truth, I think that evidence is open to suspicion and
 should be subjected to the closest scrutiny.

Now the thing that strikes me at once is that on the investi-
 ... before the magistrate the bartender does not appear to
 ... have related any tale such as he told at the rehearing on ap-
 ... indeed he had very little to say about it at all. And yet

when he gave evidence at the hearing before me he could recall the date, name the people who were in the bar during the time the Indians were supposed to be there, and give a number of other details none of which appear to have been present in his mind at the first hearing. In addition to this the two witnesses who were called to corroborate him, and who do corroborate him even to the minutest point were, apparently, not called at all at the first hearing. One is led to ask why all this evidence, apparently so conclusive in favour of the accused, was not brought forward in the first place. These circumstances lead me to suspect very strongly this evidence, and when it is opposed to the story of the Indians, which appears to me to be a frank and unbiased statement, I am forced to believe, as I do, that the evidence given by the bartender and the two other witnesses is not due to any mistake, but is evidence manufactured to suit the case with the deliberate intention of misleading the Court. I do not believe one word of it and reject it accordingly.

Considerable stress was laid by counsel for the accused upon the fact that the latter had given express instructions to the bartender not to sell liquor to any Indians, and a number of cases were cited on the argument in support of the contention that this would absolve the accused from responsibility for the acts of the bartender.

Practically all of these cases are decided with reference to other statutes and have therefore no application to the present matter. The only one calling for any comment is that of *R. v. Gee*, 5 Can. Cr. Cas. 148. This was a case decided in British Columbia under the Indian Act, and it holds that, where a cook in the employment of a hotelkeeper sold liquor to an Indian, the proprietor would not be responsible. Now, the *ratio decidendi* of that case is that the principal is not responsible for the unauthorized acts of his clerks, servants or agents outside the scope of their respective employments. With this principle I entirely agree. But in the present instance we have an act done which is distinctly within the ostensible authority of the agent, and the decision in *R. v. Gee*, 5 Can. Cr. Cas. 148, is therefore clearly distinguishable.

It seems to me that the present case is on all fours with *Police*

Commissioners v. Cartman, [1896] 1 Q.B. 655. It was there held that a hotelkeeper was liable for the act of his servant, that act having been done by the servant within the general scope of his employment, although contrary to the orders of his master.

The agency and scope of the employment having here been conclusively proved, I am of the opinion that the appellant is liable.

The conviction will, therefore, be affirmed with costs, such costs to be taxed by the clerk of Court and paid by the appellant to him within ten days after taxation.

Conviction affirmed.

[DISTRICT COURT OF MOOSE JAW, SASKATCHEWAN.]

BEFORE OUSELEY, DIST. CT. JUDGE.

REX v. GREIG.

1. BAIL AND RECOGNIZANCE (§ I—3)—CRIMINAL CHARGE—AMENDMENT OF ORDER OR MAKING NEW ORDER.

After an order for bail made by a district Court Judge has been issued and acted upon, there is no jurisdiction to amend it, but if after release of the prisoner thereunder he is re-arrested for alleged irregularity in the warrant of deliverance, bail may be applied for *de novo*.

2. BAIL AND RECOGNIZANCE (§ I—3)—SUFFICIENCY OF BAIL—DUTY OF JUDGE ORDERING BAIL.

A Judge's order for bail should not delegate absolutely to the representative of the Attorney-General the duty of the Court to stand between the Crown and the prisoner, and should therefore provide for submission to the Judge of the sufficiency of the bondsmen in case the Attorney-General is not satisfied in that regard.

3. BAIL AND RECOGNIZANCE (§I—3)—BAIL UNDER CR. CODE SEC. 698.

Where bail is granted by a Judge of a superior or county court under Cr. Code sec. 698, the sufficiency of the sureties is to be passed upon by the Judge who grants the bail; the duty of the Justices before whom the recognizance is taken is in such case of a merely ministerial character to carry out the Judge's order.

4. BAIL AND RECOGNIZANCE (§ I—3)—JUSTIFICATION OF BAIL IN CRIMINAL MATTERS—SASKATCHEWAN PRACTICE.

The practice in Saskatchewan is to require the bail to justify unless the Judge or magistrate making the order for bail dispenses with their justification because of his personal knowledge of their sufficiency.

5. BAIL AND RECOGNIZANCE (§I—3)—CRIMINAL CASE—SUBMITTING NAMES AND PARTICULARS OF BONDSMEN.

Upon an application for bail to a Judge or magistrate, the practice which should be followed is for the accused to submit the names of his sureties and their residence and occupation, and for the Judge or

magistrate, in his discretion, to give leave to the Crown prosecutor to make inquiries as to whether the proposed sureties have sufficient means to satisfy the amount in which they are to be bound, and that, after inquiries have been made and the parties heard, the Judge or magistrate should thereupon decide whether or not the bondsmen offered by the accused are sufficient.

6. BAIL AND RECOGNIZANCE (§ 1—4)—JURISDICTION AFTER COMMITTAL WHEN ACCUSED MOVED TO JAIL OUT OF DISTRICT FOR SAFE CUSTODY.

Where owing to the lack of a jail in the district in which a prisoner has been committed for trial there is no place where prisoners who are committed for safe keeping to await their trial can be confined and they are sent to a provincial jail outside of the district of the district Court Judge where the committal took place, it is to be assumed that such confinement is a confinement within such district so as to enable such district Court Judge to make an order for bail under Cr. Code sec. 698.

DECIDED: December 24, 1914.

APPLICATION for bail.

C. E. Armstrong, for the Crown.

A. W. Routledge, for the prisoner.

OUSELEY, DIST. CT. J.:—This is an application for bail. On the 16th day of December the prisoner was committed for trial by W. H. B. Spotton, Esq., acting police magistrate for the city of Moose Jaw, for an offence against sec. 396 of the Criminal Code for having sold a C.P.R. contract covering lots 33 and 34 of the plan of the town of Assiniboia, the property of one C. F. Jerram. On the same day that he was committed the accused appeared before me and was arraigned for election, and elected to be tried by a Judge and jury, and was remanded by me to gaol. Counsel for the prisoner obtained an order for bail. This order was drawn up by himself, and while not actually consenting to the order, the Crown Prosecutor, who was present at the time of the application, suggested certain alterations in the order and made no objection whatever to any of its terms.

The order for bail provides that the prisoner shall enter into a recognizance himself in the sum of \$2,000 and two sureties in the sum of \$1,000 each, "who shall justify acceptably to the agent of the Attorney-General." These words were written in ink by counsel for the prisoner. After the order for bail was made the prisoner was taken to Regina and subsequently was released, bail having been furnished. He was, however, re-arrested on the same warrant, the grounds being that the warrant of deliverance

of the prisoner was signed by one justice only and not by two justices.

Upon his re-arrest counsel for the prisoner moved before me to strike out from the order for bail the following words, "who shall justify acceptably to the agent of the Attorney-General." On the return of the motion counsel for the Crown objected that I had no jurisdiction to amend my order unless with the consent of the Crown, which consent the Crown refused to give. In this contention counsel for the Crown is quite right that I have no power to amend my order. Apart from the fact that the objectionable words in the order for bail were interlined or written in by counsel for the prisoner himself, it seems to me that, unless some authority can be shewn to me whereby I could vary the order on application, I have no jurisdiction, once an order for bail has been given, to amend or vary it. I am of opinion, however, that since the order for bail was made and it has been acted upon, the prisoner released from custody but re-arrested, that counsel for the prisoner has the right to apply to me *de novo* for an order for bail.

I may say here that if I had jurisdiction to amend or vary the order made I would have no hesitation whatever in striking out of the order the words complained of. These words, it seems to me, practically delegate to the Crown the duty of the Court to stand between the Crown and the prisoner. I think it needs only a statement of the proposition to shew how unfair and unjust it would be for prisoners confined in gaol to only obtain their liberty on furnishing bail which would be acceptable to the party who is opposing their release. I was informed that the practice in Regina was that on applications for bail the matter of the sufficiency of bail was delegated or left to the agent of the Attorney-General. I cannot conceive that this is so, and I am quite sure that what is done there is the same as the practice that I have adopted here, namely, that on the making of an order for bail the Judge informs counsel for the Crown and for the prisoner that if they cannot agree as to the sureties, to apply to the Court and the Court will decide the matter of the sufficiency of the sureties.

Mr. Routledge, for the prisoner, contended that the question of the sufficiency of bail was a matter for the magistrate alone and not for the Court. Mr. Armstrong, the counsel for the Crown,

contended that if the matter of the sufficiency of bail was not for the agent of the Attorney-General, at least it was a matter for the Court alone and not for the magistrate who might take the formal bail. I cannot accede to Mr. Routledge's proposition that the matter of the sufficiency of bail is for the magistrate, as I am clearly of opinion that, under the section of the Code under which the application is made, that the duties of the magistrate under that section are purely ministerial and that when the section directs "that the accused be admitted to bail on entering into a recognizance with sufficient sureties before two justices in such amount as the Judge directs and thereupon the justices shall issue a warrant of deliverance as hereinafter provided," that the justices have no judicial duties to perform whatever, and are merely acting in a ministerial capacity to carry out the order of the Court.

This, of course, does not apply to cases where the justices under the Code have the power to grant bail, because in granting bail in those cases they are acting judicially. I do not see how it can be contended that sec. 698 of the Code under which the order for bail was applied for in this matter that the justices are the parties who pass upon the sufficiency of the sureties offered. Section 698 reads as follows:—

"In case of an offence other than treason or an offence punishable with death or an offence under part 4 of this Act where the accused has been finally committed as herein provided any Judge of any Superior or County Court having jurisdiction in the district or county within the limits of which the accused is confined may, in his discretion, on application made to him for that purpose, order the accused to be admitted to bail on entering into a recognizance with sufficient sureties before two justices in such amount as the Judge directs, and thereupon the Judges shall issue a warrant of deliverance as hereinafter provided and shall attach thereto the order of the Judge directing the admitting of the accused to bail."

The accused having been committed for trial the justices have no power to grant bail. The matter of the sufficiency of the sureties is a matter for the Judge who grants the bail.

Upon an application for bail it has been laid down that the proper test as to whether bail should be granted or refused is whether it is probable that the party will appear to take his trial.

See *Re Robinson*, 23 L.J.Q.B. 286; *R. v. Scaife*, 10 L.J.M.C. 144. Archbold's Criminal Pleadings, 24th ed., p. 112, says the test should be applied by reference to the following considerations:—

"1. The nature of the accusation: *R. v. Baronet*, 1 E. & B. 1; *R. v. Butler*, 14 Cox's Criminal Cases, 530.

"2. The nature of the evidence in support of the accusation (*Re Robinson, supra*). *R. v. McCormack*, 17 Ir. C.L.R. 411.

"3. The severity of the punishment which conviction will entail (*Re Robinson, supra*). The character or behaviour of the accused is said to be irrelevant.

"4. Whether the sureties are independent or indemnified by the accused: *R. v. Butler*, 8 L.R. Irish 39, 14 Cox's C.C. 530; *Herman v. Jeuchner*, 15 Q.B.D. 561; *R. v. Porter*, [1910] 1 K.B. 369."

Archbold, at p. 112, has the following: "The bail must be of ability sufficient to answer for the sum in which they are bound: 2 Hawk. ch. 15, sec. 4. They are usually householders, but it is for the magistrate or Judge to act upon his discretion as to the sufficiency of bail: *R. v. Saunders*, 2 Cox 249; 1 Burns, J., Bail, 373, 30th ed.; 1 Chitty Criminal Law, 99; and the proposed bail may be examined on oath as to his means, though in criminal cases justification of bail is said not to be essential: *R. v. Hall*, 2 W. Bl. 1110; 1 Chitty Criminal Law, 100; but see *Short & Mellor's Criminal Practice*, 2nd ed., 287."

The practice in Saskatchewan has been almost universally to require the sureties to justify and I adopt therefore the practice as laid down by *Short & Mellor's Criminal Practice*, and hold that although it may be in the discretion of the Judge or magistrate, that the bondsmen of the person in custody should justify, unless the bail is personally known to the Judge or magistrate granting the order. It is further laid down that the Court or magistrate may at discretion order that reasonable notice may be given to the prosecutor and the police to enable him or them to inquire or to object as to the sufficiency of the bail.

It seems clear to me, in view of this statement of the law, that upon an application for bail to a Judge or magistrate that the practice is for the accused to submit the names of his sureties and their residence and occupation and for the Judge or magistrate in his discretion to give leave to the prosecutor for the Crown to

make inquiries as to whether the proposed sureties have sufficient means to satisfy the amount in which they are to be bound, and that after inquiries have been made and the parties heard the Judge or magistrate thereupon decides as to whether or not the bondsmen offered by the prisoner are sufficient.

It will be noticed that sec. 698 gives jurisdiction to "any Judge of any Superior or County Court having jurisdiction in the district or county within the limits of which the accused is confined" to grant bail. Mr. Armstrong objected that as the prisoner was confined in the common gaol at Regina that I had no jurisdiction over his person, as my district did not include the district or county within the limits of which the accused was confined. I am of opinion, however, that I have jurisdiction over the person of the accused. Where there is a common gaol for the whole province and the prisoner is confined in such common gaol, I think that the Judge granting bail has such constructive possession as will give him jurisdiction to make the order. Where, owing to the lack of a gaol in the district in which a prisoner has been committed for trial, there is no place where prisoners who are committed for safe keeping to await their trial can be confined and prisoners are sent to Regina for safe keeping. I am of opinion that the magistrates or Judges of the different districts by whose order the prisoner is confined in the common gaol at Regina have such constructive possession of the prisoners as would give them jurisdiction over such prisoners, and it is to be assumed that the confinement at Regina is a confinement within the district of the magistrate or Judge granting the order for bail.

By sec. 3 of ch. 67 of the Revised Statutes of Saskatchewan, being an Act Respecting Gaols and Prisons, it is enacted that "until otherwise provided by competent authority the buildings and premises now in use or hitherto claimed to be common gaols in Saskatchewan shall continue to be the common gaols of the province." I think I can give no other reading of the words "common gaols in Saskatchewan" than meaning gaols common to all the different districts in the province, and that the prisoner here being confined in the common gaol at Regina is within the spirit of sec. 698 of the Code confined in the common gaol for the Judicial District of Moose Jaw, and within the limits of this Judicial District.

Order for bail.

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE HAULTAIN, C.J., LAMONT AND ELWOOD, JJ.

REX v. HOWES.

1. SECRET COMMISSIONS (§ I—10)—EMPLOYEE RECEIVING SECRET COMMISSION
—CRIMINAL OFFENCE—RAILWAY FREIGHT CONDUCTOR SPOTTING CARS.

Where a railway conductor was charged under the Secret Commissions Act, Can., 1909, for taking money for his own use from a farmer for "spotting" cars required under the Grain Act, Can., and which it was the conductor's duty to place at a station where there was no agent, and the defence developed on cross-examination of the Crown witnesses was that the amounts paid to him by the farmer at various times were tips or gratuities made after the location of the cars and not sums bargained for, it is competent for the Crown to adduce evidence in rebuttal of the suggested defence by calling other farmers who had at approximately the same time made similar payments to him for the allocation of cars to them for an agreed consideration; such evidence, although not admissible to prove the main facts of the case, was admissible to rebut by anticipation the indicated defence of innocent motive and want of design and to shew the state of mind of the parties with regard to the facts proved, although no witnesses were called for the defence.

[*Makin v. A.-G. for New South Wales*, [1894] A.C. 57, applied; *R. v. Birney*, 3 Can. Cr. Cas. 339; *R. v. Collins*, 4 Can. Cr. Cas. 572; *R. v. Pollard*, 15 Can. Cr. Cas. 105; *R. v. Wilson*, 21 Can. Cr. Cas. 105, cited.]

DECIDED: November 28, 1914.

CROWN case reserved.

MacKenzie, K.C., for the Crown, referred to the following authorities: *Law Quarterly Review*, [1907], vol. 23, p. 28; *Archbold*, 28th ed., 366-371; *Reg. v. Geering* (1849), 18 L.J. (M.C.) 215; *Makin v. Attorney-General for N.S. Wales*, [1894] A.C. 57; *Reg. v. Ollis* (1900), 2 Q.B. 758; *Reg. v. Wyatt* (1904), 2 K.B. 389; *R. v. Fisher* (1910), 1 K.B. 149; *R. v. Ellis* (1910), 2 K.B. 746; *R. v. Boyle* (1914), 3 K.B. 339; *Reg. v. Birney*, 3 Can. C.C. 339; *Reg. v. Collins*, 4 Can. C.C. 572; *R. v. Pollard*, 15 Can. C.C. 105; *R. v. Wilson*, 21 Can. C.C. 105.

No one for accused.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—The case reserved by the learned trial Judge for the opinion of this Court is as follows:—

"The accused was a conductor in the employ of the C.N.R. Co., and he was charged under the Secret Commission Act,

1909, for having taken certain sums of money for spotting cars at a way station on the C.N.R. Co.'s line of railway where there was no agent. It was a part of his duty to spot these cars, and there was no provision, nor had he any right to get compensation from the farmers who required cars for spotting them. These cars were being placed at the station for farmers under the provisions of the Grain Act.

"On the first trial of the accused, he having been tried twice, and the jury having disagreed on the first trial, Mr. MacKenzie, K.C., the Crown prosecutor, asked me to admit evidence of farmers other than the complainant who had also paid to the accused sums of money for spotting cars for them. As I was under the impression that evidence of this kind would be similar to evidence of other thefts in a case of theft, and would go more to prove the general bad character of the accused than to prove him guilty of the offence, I refused to admit the evidence. On the second trial, however, I came to the conclusion that the offence with which he was charged was that of taking money for spotting cars at this station, which spotting was a part of his duty under the terms of his engagement, and for which he was not entitled to charge the farmers for whom he spotted the cars any consideration; and that the fact that the charge specified one particular instance of the paying of money to a particular farmer would not of itself shut out the evidence of other farmers paying the accused for doing the same work. I therefore on the second trial admitted the evidence of a large number of farmers, whose names were not mentioned in the charge, who had paid various sums of money to Howes in order to get him to spot cars for them at the same station. - The jury in the second case brought in a verdict of 'guilty,' and I bound the accused over to appear for sentence, and decided to submit a case for the opinion of the Court as to whether I was correct in admitting this evidence at the second trial.

"The question to be submitted for the opinion of the Court is: Was the evidence of these other farmers, whose names were not mentioned in the charge, that they had paid the accused for spotting cars, proper evidence to be admitted under the charge in this case?"

As no one appeared on behalf of the accused, we are doubly indebted to Mr. MacKenzie for his very comprehensive and impartial presentation of the cases bearing on the point reserved for our decision.

The facts of the case are not in dispute, and no evidence for the defence was offered on the trial.

The accused was a conductor in the employ of the Canadian Northern Railway Co. As a part of his duty he was required to take and place cars at a station called Birdview for the use of farmers, under the provisions of the Grain Act. It was not part of his duty, and he was not authorized, to allocate any particular car to the use of any particular farmer. A farmer called Buchanan, being anxious to obtain a car for loading his grain at Birdview, had some negotiations with the accused, in the course of which the accused undertook to secure him a car if he would pay him five dollars. This arrangement was carried out on several occasions, on each of which the payment of \$5 was made.

Although there was no evidence put in for the defence, the cross-examination of the witnesses for the Crown clearly developed an attempt on the part of the defence to shew that these payments made to the accused were not made as an agreed consideration for services rendered, but were simply gratuities or tips made to the accused after the event by a grateful farmer. Evidence was then offered by the Crown of other cases where the accused was paid money by farmers for securing cars for them. This evidence was objected to, and the question now submitted for our consideration is whether this evidence was properly admitted.

In the case of *Makin v. A.-G. for New South Wales*, [1894] A.C. 57, at 65, Lord Herschell, in delivering the judgment of the Judicial Committee of the Privy Council, stated the principles upon which evidence to shew intent is admitted as follows:—

“In their Lordships’ opinion, the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused

is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

In the case before us, the doing of the act, that is, the taking of the money, and the connection of the parties with that act, were sufficiently proved by Buchanan. The evidence objected to was not offered and would not have been admissible to prove the main facts of the case. It was clearly put in to rebut by anticipation the defence of innocent motive and want of design, and to shew the state of mind of the parties with regard to the facts proved. The evidence given proves other acts of the same kind as that in question and proximate in point of time. It clearly shews that payments of a similar character were exacted by the accused in several other cases as a condition upon which cars would be furnished, and completely rebuts the defences suggested by cross-examination.

In my opinion, therefore, the evidence was admissible, and the question submitted to us should be answered in the affirmative.

Conviction affirmed.

[SUPREME COURT OF SASKATCHEWAN.]

JUDICIAL DISTRICT OF REGINA.

BEFORE ELWOOD, J., IN CHAMBERS.

REX v. WATCHMAN.

1. THEFT (§ I—5)—RECEIVING STOLEN GOODS—ALLEGING THE THEFT.

A magistrate's conviction under Cr. Code sec. 399 should show not only that the accused received the goods knowing them to have been stolen but should contain an allegation as to the goods having theretofore been stolen, it being possible that prior to the goods reaching the accused they may have lost the character of stolen goods and yet be known to him to have been stolen.

[*R. v. Schmidt*, 35 L.J.M.C. 94, referred to.]

2. CERTIORARI (§ II—28)—RETURN OF AMENDED CONVICTION—DEPOSITIONS.

If the magistrate returns to a *certiorari* an amended conviction by which the substance of that first drawn is changed, the Court may decline to accept the amended conviction in the absence of the depositions.

[*R. v. Barker*, 1 East 188, referred to.]

DECIDED: December 28, 1914.

MOTION for a writ of *habeas corpus*.*W. H. McEwen*, for prisoner.*H. E. Sampson*, for the Crown and the Department of the Attorney-General.*J. F. Bryant*, for Canadian Pacific Railway Company.

ELWOOD, J.:—This is an application for a writ of *habeas corpus* and for a writ of *certiorari* in aid thereof. The prisoner was, on the 3rd day of December, 1914, tried before William Trant, police magistrate, under an information charging the prisoner that he did, on the 27th day of November, 1914, at Regina, in the province of Saskatchewan, unlawfully have in his possession thirty-three grain doors of the value of over ten dollars, the property of the Canadian Pacific Railway Company, he, the said Watchman, then knowing the same to have been stolen, and on the same day was convicted by the said magistrate. The minute of conviction is as follows:—

"I do convict the within-named accused of the offence charged and do order that he be imprisoned with hard labour

for the term of three months. I do further order that he pay to the Canadian Pacific Railway Company the sum of \$33 for damages, to be paid forthwith; in default of payment forthwith to be imprisoned for a further term of one month."

The formal conviction was on the same day made out in the terms of the above minute of conviction, and a warrant issued, which warrant omitted from it any reference to payment of the \$33 or imprisonment in default thereof, and commanded the imprisonment for the three months above-mentioned. The objections which were urged before me were the following:—

1. The conviction and complaint herein, the police magistrate's minute of adjudication, the conviction and the warrant of commitment herein state no offence known to the law.

2. The police magistrate had no jurisdiction to order the accused to pay the sum of \$33 or any sum to the Canadian Pacific Railway Company as damages or at all.

4. The police magistrate had no jurisdiction to order that, in default of payment by the accused of the sum of \$33 to the Canadian Pacific Railway Company as damages, the accused should be imprisoned for a further term of one month.

On the return of the motion before me, two amended convictions were filed, one convicting the accused for that he, on the 27th day of November, 1914, at Regina, in the said province, did receive and have thirty-three grain doors of the value of over \$10, the property of the Canadian Pacific Railway Company, and theretofore stolen, he, the said Thomas Watchman, then well knowing the said grain doors to have been stolen, and adjudging the said Thomas Watchman to be imprisoned with hard labour for three months, and ordering the repayment of the sum of \$33 as compensation, without adjudging any penalty for failure to pay the \$33.

The other conviction convicted the accused in the terms of the second conviction, but merely adjudged him to be imprisoned with hard labour for three months, and made no reference to the payment of the \$33. At the hearing, counsel for the Attorney-General stated that he elected to rely on the third conviction instead of the second. It was stated to me by counsel that the evidence before the magistrate was taken in shorthand, and that the reporter who took this evidence had gone to England, and

he would not likely return till March; and, as the evidence had not been extended, there was, therefore, nothing before me to shew what evidence was before the magistrate when he made the conviction. Counsel for the informant and for the Attorney-General contended that the magistrate had the right to return an amended conviction, and that in any event I had the right to amend the conviction under sec. 1124 of the Criminal Code. So far as my powers are concerned, I am satisfied that, before I can amend the conviction, I must have before me the depositions, and I must be satisfied from a perusal of the depositions that the depositions justify the amendment. The objection to the conviction, apart from that which adjudges compensation and imprisonment in default thereof, is that neither the information nor the minute of conviction nor the original conviction states that the goods in question had been stolen. The conviction is apparently under sec. 399 of the Code—at least, that is the only section to which I was referred. While it is probable that in most cases, in order to prove the guilty knowledge, it would be necessary to prove the actual theft of the goods, yet it is quite conceivable that it could be possible for one to have in his possession goods which he knew to have been stolen, and yet those goods, prior to their having reached him, may have lost the character of stolen goods. See *Regina v. Schmidt*, 35 L.J., Mag. Cas., 94.

I notice, in looking at the forms of indictment for various offences contained in the Code, that the form of indictment for receiving stolen goods does contain an allegation that the goods had theretofore been stolen. I am of the opinion, therefore, that the information, minute of conviction and conviction as originally drawn were bad in that they did not contain an allegation that the goods had theretofore been stolen.

So far as the amendment by the magistrate is concerned, the magistrate, assuming that he had the right to amend, would have to have before him evidence which would justify an amendment. See Paley on Convictions, 7th ed., p. 234. In *Rex v. Barker*, 1 East, p. 188, Lord Kenyon, C.J., says:—

“If the magistrate has done no more than return the conviction in a mere formal shape, instead of sending it up in the informal manner in which it was first drawn, and sup-

posing that the facts as they really happened would warrant him in the return he has now made, the contrary of which is not imputed, I am of the opinion that it was not only legal but laudable in him to do as he has done, and he would have done wrong if he had acted otherwise."

In the case at bar, objection was made that the evidence was not before me, and it was, as I understood, suggested that the evidence would not warrant the conviction. I think, therefore, that a question having arisen as to the evidence, I would not be justified in accepting the amended conviction under the circumstances of this case in the absence of the depositions, nor have I power myself, in the absence of the depositions, to amend.

The result will be that the conviction and the warrant of commitment will be quashed, but there will be no action against the magistrate.

Under all of the circumstances of this case I will not award any costs to either party.

Prisoner discharged.

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE NEWLANDS, LAMONT, BROWN AND ELWOOD, JJ.

REX v. SCHURMAN.

1. TRIAL (§ III E 5—263)—CRIMINAL CASE—INSTRUCTION AS TO REASONABLE DOUBT.

In order to enable a jury to return a verdict against the prisoner, they must be satisfied beyond any reasonable doubt of his guilt; this is a conviction created in their minds not merely as a matter of probability and if it was only an impression of probability their duty was to acquit.

[*R. v. White*, 4 F. & F. 384, and *R. v. Krafchenko*, 22 Can. Cr. Cas. 277, 17 D.L.R. 244, applied.]

2. NEW TRIAL (§ II—8)—CRIMINAL CASE—MISDIRECTION AS TO REASONABLE DOUBT.

A new trial will be ordered in a criminal case on the ground that the instruction to the jury may have misled them on the question of reasonable doubt and so have led them to apply the rule as to the balancing of mere probabilities as in civil cases.

DECIDED: November 28, 1914.

MOTION for leave to appeal on a conviction for attempted rape.

By consent of the Crown the case was dealt with on the motion as if a case had been stated after leave to appeal.

J. A. Allan, K.C., for accused.

T. A. Colclough, K.C., Deputy Attorney-General, for Crown.

The judgment of the Court was delivered by

BROWN, J.:—The accused was tried with a jury and convicted on the charge of attempted rape. At the conclusion of the charge to the jury by the learned trial Judge, Mr. Allan, K.C., counsel for the accused, made the following request:—

“I would ask your Lordship to direct the recall of the jury and to direct them that a verdict of acquittal does not necessarily mean a verdict of finding that the prosecutrix is a woman of loose character, that it simply means that they are not convinced that her story is the correct one with such conviction as will enable them to bring in a verdict of ‘guilty.’ The principle of reasonable doubt may well be applied where stories are contradictory and they cannot bring their minds to a decision as to which story is to be accepted and that in such cases the doubt must be given to the prisoner.”

The trial Judge refused to recall the jury and refused to grant a reserved case. The accused now applies to this Court for leave to appeal, and on the argument before us counsel for the Crown agreed that we should deal with the matter as if a case had been stated.

The following portions of the Judge’s charge are, in my opinion, the only ones material to the consideration of the question:—

“However, this case, like so many unfortunate cases of a similar nature, involves the question of which of two witnesses to believe. You have the two contradictory stories one told by Mrs. Sholts, the other by the accused, Schurman,” and again “You are the sole judges of the facts. You have heard the evidence of both parties; and it is for you to say which of the stories is to be believed. You are not bound by any expression of opinion I may make on the facts. It is for you to say which witness you are to believe,” and further, “I must say that it makes it very difficult for you, because there is so little to help you to come to a conclusion. But you must

form a conclusion from the evidence. It is for you to say which of these two parties is telling the truth. If you believe that the story of the woman is the correct one, then you must find that the accused is guilty of an attempt to commit the offence charged. If, on the other hand, you believe that the story of the man is correct, then you must find that the woman is a woman of loose character, and, more than that, that she is guilty of telling deliberate lies in the witness-box. I need not say much in regard to the presumption of the prisoner's innocence. Mr. Allan has gone into that fully. The prisoner is presumed to be innocent until he is proved to be guilty. That is quite true, but on the other hand, as soon as there is sufficient evidence before you which would tend to point to the guilt of the accused, then the presumption is on the other side, because if you believe one story he is guilty, and if you do not believe that story he is innocent. Then there is the point Mr. Allan mentioned about reasonable doubt. There does not seem to be much room for doubt in this case. There cannot be even reasonable doubt if you believe either one of these stories. If you believe the story of the woman there is no doubt of the guilt of the accused, and if you believe his story then there is no room for doubt of his innocence."

Unfortunately we do not know what Mr. Allan's remarks to the jury were on the question of presumption and reasonable doubt, but we can scarcely assume that they were sufficient to offset any wrong impression that the Judge's charge may have made on the minds of the jury. I am of opinion that the Judge's charge is objectionable for two reasons: Firstly, it tended to give the jury the impression that they must believe the story either of the prosecutrix or of the accused, and that it was their duty to decide which one of the two was telling the truth. The possibility of neither party stating the whole truth was not, in my judgment, sufficiently put before the jury. As a matter of fact, in cases of this character, according to my experience, it very often happens that both parties considerably colour the truth. Then, in the event of the jury being unable to satisfy themselves as to who was telling the truth, it should have been made clear to them that their duty was to acquit. Secondly, I am of opinion that the Judge erred in stating,

"As soon as there is sufficient evidence before you which would tend to point to the guilt of the accused, then the presumption is on the other side."

An accused person is presumed to be innocent until he is proven guilty beyond a reasonable doubt, and the presumption of innocence, therefore, cannot be shifted at the point where the evidence tends or inclines in the direction of guilt. In *Reg. v. White*, 4 F. & F. 383, at 384, Martin, B., is reported to have instructed the jury

"that, in order to enable them to return a verdict against the prisoner, they must be satisfied, beyond any reasonable doubt, of his guilt; and this as a conviction created in their minds, not merely as a matter of probability; and if it was only an impression of probability, their duty was to acquit."

This case, though decided in 1865, has always been regarded as laying down the rule correctly. In *Russell on Crimes*, at p. 2058, the following statement appears:—

"A person accused of crime is presumed to be innocent until the presumption is rebutted by legal evidence, whether direct or circumstantial, excluding all reasonable doubt of his guilt."

Taylor on Evidence, 10th ed., lays down the rule as follows (p. 113):—

"One of the most important of disputable legal presumptions is that of innocence. This, in legal phraseology, 'gives the benefit of a doubt to the accused,' and is so cogent, that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty. In civil disputes, when no violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burden of proof, may constitute sufficient ground for a verdict. To affix on any person the stigma of crime requires, however, a higher degree of assurance; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt."

I think Mathers, C.J., in the case of *Rex v. Krafchenko*, 22 Can. Cr. Cas. 277, at 296, 17 D.L.R. 244, has very correctly stated the rule where he says:—

"I have told you that you should not convict if you have a reasonable doubt of the prisoner's guilt. By the term reasonable doubt I do not mean a possible doubt, but an actual and substantial doubt. A juror may not create materials of doubt by resorting to trivial suppositions and remote conjectures as to a possible state of facts different from that established by the evidence. If, after a fair and impartial consideration of all the evidence in the case both for the Crown and for the defence, you have an abiding conviction of the guilt of the defendant and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond reasonable doubt; but if the evidence has left you in that condition of mind that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge, then you have a reasonable doubt."

In my view the charge of the learned trial Judge may have misled the jury, and therefore the conviction should be quashed and a new trial ordered.

New trial ordered.

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE NEWLANDS, BROWN AND ELWOOD, JJ.

REX v. HOLDERMAN.

1. NEW TRIAL (§ II—8)—CRIMINAL CASE—MISDIRECTION AS TO LAW.

Where the trial Judge erred in his charge to the jury as to the validity of a seed grain mortgage in question on a false pretence charge, a new trial should be ordered by the appellate Court if it considers that the jury may have been influenced to convict by that portion of the charge.

2. CHATTEL MORTGAGE (§ II C—16)—FUTURE CROP—SEED-GRAIN MORTGAGES IN SASKATCHEWAN.

A valid chattel mortgage can be taken in Saskatchewan for the price of seed grain sold *bond fide* for seed purposes on any crop to be grown by the mortgagor whether the same be grown from the seed sold or not.

3. FALSE PRETENCES (§ I—10)—INFERENTIAL PRETENCE WITHOUT EXPRESS WORDS.

False pretences may be founded on the false idea conveyed fraudulently by the accused; it is not requisite that the false pretence should be made in express words.

[*R. v. Cooper*, 13 Cox C.C. 617, 46 L.J.M.C. 219, and *Edgington v. Fitzmaurice*, 29 Ch.D. 459, referred to.]

DECIDED: November 28, 1914.

CROWN case reserved by Lamont, J.

H. E. Sampson, for the Crown.

H. Y. MacDonald, K.C., for the accused.

NEWLANDS, J.:—This is a case reserved by my brother Lamont for the opinion of this Court.

The accused was charged with obtaining a quantity of wheat by false pretences. The reserved case states:—

“The accused went to Koenig and asked him if he had any seed grain for sale, saying that he required 275 bushels to sow, that he had no money, but that he would give a seed grain mortgage for the purchase-price . . . The accused obtained 275 bushels altogether, and sowed on his farm 180 bushels. (He sold the balance the day after he got it.) Some time later the accused saw Parks (the owner of the wheat) and gave him a seed grain mortgage on the south-east of 20-27-25, west 2nd, and the north-west of 28-27-25, west 2nd. He had no interest whatever in the north-west of 28-27-25 . . . I instructed the jury that the statement made by the accused that he required 275 bushels to sow could be interpreted as a declaration on his part that he was farming in such a large way that he required 275 bushels to seed the land which he was sowing in wheat; and that the statement that he would give a seed grain mortgage for the price thereof implied that he was in a position to give a valid seed grain mortgage therefor; and that, if these were false to the knowledge of the accused and were made with the fraudulent intent of inducing Koenig or Parks to part with the wheat, and as a result thereof they did part with it, that they could find the accused guilty of obtaining by false pretences the wheat which he took to the elevator and sold. The jury found the accused guilty.

“The questions reserved for the Court are:—

“(1) Was I right in so instructing the jury?

“(2) Was there evidence on which the jury were entitled to convict the accused? (This question I reserve at the request of counsel for the accused.)”

The seed grain mortgage given by the accused was filed in the wrong registration district, and was therefore invalid against subsequent purchasers, and the accused, having assigned his interest in the crop, the mortgagee, Parks, was unable to recover the amount secured thereby. The learned Judge, in his charge to the jury, said:—

“For the purposes of this case I am not going to ask you to consider whether or not he had altogether parted with his interest for that year in the crop grown upon section 20. I am going to ask you to assume that, having an interest in the property he had a right to place a seed grain mortgage upon that land for whatever amount of seed was necessary to sow the south-east quarter of section 20; that, having done that, for the purposes of this case that seed grain mortgage was a valid mortgage to the extent of the grain sown upon that quarter section. What was that? You have the evidence of one of the witnesses before Hyde that there was 150 bushels sown upon the quarter section; but you have the evidence of Hyde, who was farming the land, although the accused actually sowed the grain, that he sowed 120 acres, and $1\frac{1}{2}$ bushels to the acre, which would amount to 180 bushels of seed grain. Now, to give a seed grain mortgage upon the land he could only give, under the statute, a valid mortgage for what was used for seed grain purposes, and if he bought more wheat than what he needed for seed grain purposes, and you are satisfied that at the time he bought it he knew he was not going to use it for seed grain purposes, and that he could not give a valid seed grain mortgage for that grain which he was going to sell, then that is obtaining seed by false pretences to the extent which he bought over and above the amount that was bought that was necessary to sow the south-east quarter of 20.”

The statute which the learned Judge referred to is the Chattel Mortgage Act, ch. 144, R.S.S. Section 17 of that Act provides that no mortgage, etc., which is intended to have effect as a security on any growing crop or crop to be grown in future shall be valid except the same be made as a security for the purchase price of seed grain. Sub-section 2 provides that the affidavit of *bonâ fides* among the other necessary allegations shall contain

a statement that the same is taken to secure the purchase price of seed grain, and sub-sec. 5 provides that the date of the purchase of the seed grain, the number of bushels purchased, and the price thereof per bushel, shall be stated in the mortgage as well as in the affidavit of *bonâ fides*. And this sub-section further provides that such a mortgage shall be a first and preferential security for the sum therein mentioned. The mortgage given contained these particulars as well as the affidavit of *bonâ fides*, and would have been a valid security as far as the south-east quarter of 20 was concerned if it had been filed in the proper registration district.

The learned trial Judge's opinion as expressed in his charge to the jury is that in order that a seed grain mortgage be valid, the seed grain, the price of which is secured by the mortgage, must be sown on the land covered by the mortgage, and that therefore the mortgage in question was valid only for the price of the 180 bushels sown on the south-east quarter of 20, and invalid as to the balance of the grain which the accused sold. Is this a correct interpretation of the statute in question? I am of the opinion it is not. The statute makes no mention of where the seed grain is to be sown. The mortgage to be valid must contain only, the date of the purchase of seed grain, the number of bushels purchased, and the price thereof per bushel, and the affidavit of *bonâ fides* which is taken by the mortgagee must contain the same information and a statement by him that the same is taken to secure the purchase price of seed grain. It was not, in my opinion, the intention of the Legislature that the seller should have to follow the grain to see that it was sown upon the land mentioned. This would be a practical impossibility unless the vendor sowed the grain himself. The sale must on his part be a *bonâ fide* sale of seed grain, and he must swear to that fact, but he is required to go no further, and if the requisites of the statute are complied with his security is a valid one. In this case the statute was complied with, and therefore the mortgage given by the accused was a first and preferential security upon the crop grown on the south-east quarter of 20.

Now, the inducement upon which the vendor sold the grain was that the accused would give him a valid mortgage for the price thereof, and as he was given this, there is no fraud on the part of the accused. As it subsequently turned out, this mortgage

was no security, but that was the fault of the mortgagee. He filed his mortgage in the wrong registration district, and it was therefore invalid as against subsequent purchasers for value. As this state of affairs could not have been in the contemplation of either party at the time of the sale of the grain or the giving of the mortgage, it does not affect the question I am considering.

The learned Judge was therefore wrong in telling the jury:—

“Now, to give a seed grain mortgage upon the land he could only give, under the statute, a valid mortgage for what was used for seed grain purposes, and if he bought more wheat than what he needed for seed grain purposes, and you are satisfied that at the time he bought it he knew he was not going to use it for seed grain purposes, and that he could not give a valid seed grain mortgage for that grain which he was going to sell, then that is obtaining seed by false pretences to the extent which he bought over and above the amount that was bought that was necessary to sow the south-east quarter of 20.”

What the reasons of the accused were for including the quarter of 28 in which he had no interest in the mortgage are not given, but the fact that this quarter was included would not invalidate the mortgage on the quarter that he owned and on which a crop was sown. At the time he purchased the wheat no land was mentioned. He simply said he would give a seed grain mortgage for the price. This was, in my opinion, the inducing cause for the sale of the wheat to him. Subsequent events shew that at the time he made this statement he did intend to give a valid seed grain mortgage for the price, and it was therefore not a false pretence. The amount of wheat he wanted would have nothing to do with the sale if he could give a valid seed-grain mortgage for the price, and therefore if it was not made to induce the vendor to sell him the wheat it was not a false pretence.

I am of the opinion that the learned Judge was wrong in instructing the jury as he did, and that both questions should be answered in the negative.

The conviction should therefore be quashed.

BROWN, J. (after stating the case reserved):—Dealing first with the second question submitted, the following evidence of Koenig shews what actually took place:—

"Q. What took place between you and him (the accused) at that time? A. He came and asked me if I had any wheat to sell. I told him I had. He said, 'I would like to have 275 bushels of wheat, to sow.' He said he didn't have the money to pay for it, but said he would give a seed grain mortgage on it. I told him I could not sell it to him until I seen Mr. Parks, the agent."

After Koenig had seen Parks he again interviewed the accused, and the following evidence shews what occurred:—

"His Lordship: Well, you say he asked you then, 'Have you seen Mr. Parks?' and you said to him, 'Yes, you can have it under that condition.' Is that exactly the way it was put? A. Yes, that is the way it was put."

A false pretence is a representation, either by words or otherwise, of a matter of fact either present or past which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation: Criminal Code, sec. 404. To fully appreciate the force of the language used by the accused, it is necessary to have in mind sec. 17 of the Chattel Mortgage Act, ch. 144, R.S.S., and which, in view of another phase of this case, it seems to me advisable to quote in full:—

"17. No mortgage, bill of sale, lien, charge, incumbrance, conveyance, transfer or assignment hereafter made, executed or created, and which is intended to operate and have effect as a security shall in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future in whole or in part be valid except the same be made, executed or created as a security for the purchase price and interest thereon of seed grain.

"(2) Every mortgage or incumbrance upon growing crops or crops to be grown, made or created to secure the purchase price of seed grain shall be held to be within the provisions of this Act, and the affidavit of *bonâ fides* among the other necessary allegations shall contain a statement that the same is taken to secure the purchase price of seed grain.

"(3) No mortgage or incumbrance to secure the price of seed grain shall be given upon any crop which is not sown

within one year of the date of the execution of the said mortgage or incumbrance.

"(4) Every registration clerk shall be entitled to receive the same fees for his services as provided for under sec. 35 of this Act.

"(5) Every such seed grain mortgage so taken and filed shall not be affected by or subject to any chattel mortgage or bill of sale previously given by the mortgagor or by any writ of execution against the mortgagor in the hands of the sheriff at the time of the registration of such seed grain mortgage but such seed grain mortgage shall be a first and preferential security for the sum therein mentioned; the date of the purchase of seed grain, the number of bushels purchased and the price thereof per bushel must be stated in the mortgage as well as in the affidavit of *bond fides*."

The accused wanted grain; he had no money to pay for same; but by his statement he evidently knew that he had the right to give a chattel mortgage on his crop to be grown to secure the purchase-price thereof. Under the circumstances, what meaning is the language which he used in getting the grain reasonably capable of conveying? It seems to me that it might be said, as stated by the learned trial Judge, that he thereby represented that he was farming in such a large way that he would require during that year for seed wheat 275 bushels, or, to say the least, that his present farming prospects and plans were such that he would require that amount of grain for seed. Taking the interpretation which is more favourable from his point of view, I am of opinion that the language used would constitute a false statement of fact within the meaning of the Code, assuming, of course, that he had no such prospects or plans as suggested. In *Reg. v. Cooper*, 13 Cox C.C. 617, 46 L.J.M.C. 219, the accused was charged with falsely pretending that he was a dealer in potatoes, and as such dealer, in a large way of business and in a position to do a good trade in potatoes and able to pay for large quantities of potatoes, as and when the same might be delivered to him. The only evidence thereof was the following letter from the prisoner to the prosecutor:—

"Dear sir:—Please send me one truck of regents and one truck of rocks as samples at your prices named in your letter;

let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours truly, William Cooper.

"P.S.—I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on."

It was held that the false pretences alleged were proved, the letter reasonably conveying to the mind the construction put upon it in the indictment. Lord Coleridge, C.J., is reported at p. 620 as follows:—

"The question for the Court, as I understand the case, is whether there was evidence upon which the false pretences alleged in the indictment could fairly be sustained. The indictment alleges that the prisoner falsely pretended that he was a dealer in potatoes, and as such dealer then was in a large way of business, and that he was in a position to do a good trade in potatoes, and that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, and that a large quantity of potatoes was obtained by means of those false pretences. It is not contended by the prisoner's counsel that if the false pretences were truly alleged in the indictment they were not negatived by the evidence. The question is whether the letter set out in the case, which was the only evidence of the false pretences, sustains the allegations thereof in the indictment. At first I was under the impression that it was enough for the prisoner to shew that the false pretences alleged to be conveyed by the letter to the prosecutor did not necessarily arise from the letter, but if the letter would bear an innocent construction the charge would not be made out; but upon consideration I am satisfied that that was a mistaken view, and that it was a question for the jury whether the false pretences alleged did or did not reasonably arise from the letter. I have no desire to protect persons who conduct their business in a loose and careless manner, but at the same time we must be guided in our decisions by the principles of the criminal law. The true principle applicable to this case was well enunciated by Blackstone, J., during the course of the argument in *Reg. v. Giles*, 10 Cox C.C. 44: 'It is not requisite that the false

pretence should be made in express words, if the idea is conveyed.'"

Denman, J., at p. 622, says:—

"In *Reg. v. Giles*, 10 Cox C.C. 44, the prisoner pretended that she had power to bring the prosecutrix's husband back, and that was held to be a statement of fact. That warrants us in holding that where a man is not in a position to do what he professes he will do at a given time, he is making a false statement of fact. The indictment charges that the prisoner falsely pretended that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, and that pretence, I think, is proved by the letter."

And Pollock, B., on the same page, says:—

"Having heard the whole of the argument, I have come to the conclusion that the conviction should be affirmed. It is not sufficient for the prisoner to shew that the letter might bear another meaning, if it is reasonably capable of bearing the meaning imputed to it in the indictment. It is the duty of the prisoner to shew by special circumstances that it bore the construction he contends for. I think that the false pretences charged may be fairly inferred from the letter, and that the conviction should be affirmed."

In the case of *Edgington v. Fitzmaurice*, L.R. 29 Ch.D. 459, at 483, Bowen, L.J., is reported as follows:—

"There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."

The evidence goes to shew that neither at the time the wheat was obtained nor at any time thereafter did the accused have any need for 275 bushels of seed wheat. As a matter of fact, he had only a quarter-section of land, and even had he cultivated the whole quarter and seeded it in wheat he would not have required 275 bushels. He apparently had only 120 acres under cultivation, and in order to sow that amount required only 180 bushels of

grain. This, together with the very important evidence that he, almost immediately after the purchase, sold a large quantity of the grain, goes to shew that the representations of the accused were false and were fraudulently made. The accused gave a mortgage on the 120 acres actually sown to secure the whole of the purchase-price, and this, in my opinion, constitutes a valid mortgage for the whole price to the full extent of the grain grown on the 120 acres. But it will be necessary for me to deal with this point at greater length when I am considering the first question submitted. The representations made were such that their truth or falsity was a material element in the value of the security promised, and can, I think, be fairly said to have been an inducing cause to the vendor to part with his grain. The vendor would have a right to expect that the accused would sow enough land to require the 275 bushels as seed, and that the chattel mortgage could and would be given on the grain to be grown on that amount of land. In the case of *Edgington v. Fitzmaurice*, *supra*, Bowen, L.J., at p. 483, says:—

“Then the question remains—Did this misstatement contribute to induce the plaintiff to advance his money? Mr. Davey’s argument has not convinced me that it did not. He contended that the plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material. But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the plaintiff’s mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact.”

As to the second question, therefore, I am of opinion that there was ample evidence on which the jury could convict.

Dealing with the first question submitted, the learned trial Judge in his charge to the jury used the following language:—

“Now, to give a seed grain mortgage upon the land he could only give, under the statute, a valid mortgage for what

was used for seed grain purposes, and if he bought more wheat than what he needed for seed grain purposes, and you are satisfied that at the time he bought it he knew he was not going to use it for seed grain purposes, and that he could not give a valid seed grain mortgage for that grain which he was going to sell, then that is obtaining seed by false pretences to the extent which he bought over and above the amount that was bought that was necessary to sow the south-east quarter of 20."

The consideration of this portion of the charge requires an examination of sec. 17 of the Chattel Mortgage Act above quoted. The object aimed at by the Legislature, as appears from an examination of this section, is in my opinion to enable farmers who are in need of seed grain and who are not in a position to pay cash for the same to nevertheless secure sufficient for their need. They are put in the position of being able to give to the vendor security on crops not yet in existence, and this security is made preferential. There is nothing in the language of the statute which would confine the security given to the crop grown from the seed actually furnished. To so construe the statute would mean that the vendor of seed grain would, at the risk of losing his security, or, having no security at all, be compelled to see that the grain sold was actually sown. This would be practically impossible unless the vendor himself sowed the grain. In that view of the law, I venture to suggest that very few men would want to part with their grain, and what appears to me to be the very object of the statute would be defeated. I am of opinion that it is sufficient if the vendor *bond fide* sells the grain for seed purposes, and that he can take a valid security for the purchase price on any crop whether the same be grown from the seed sold or not. The accused would therefore be able to give a valid mortgage on the crop grown on the south-east quarter of section 20 to secure the price of all the grain purchased.

I am therefore of the opinion that the learned trial Judge erred in his charge to the jury on this point, and as the jury may have been influenced by that portion of the charge, a new trial should be ordered.

ELWOOD, J., concurred with BROWN, J.

New trial ordered.

[SUPREME COURT OF SASKATCHEWAN.]

BEFORE HAULTAIN, C.J., IN CHAMBERS.

REX. v. SCHILLING.

1. DENTISTS (§ I—6)—PRACTISING WITHOUT LICENSE.

That an unqualified person is doing dental practice and is seemingly in full charge of the business carried on under the name of another person resident in a distant city for his own benefit may constitute a *prima facie* case of practising in contravention of the Dental Profession Act, R.S.S. ch. 108.

2. SUMMARY CONVICTION (§ V—50)—IMPRISONMENT IN DEFAULT OF PAYING FINE—SPECIAL ACT.

The magistrate making a summary conviction for an infraction of the Dental Profession Act, R.S.S. ch. 108, has power to order imprisonment forthwith in default of payment of the fine and costs, although sec. 51 of that Act provides a special mode of levying a fine by distress.

[Cr. Code sec. 739; R.S.S. ch. 1, sec. 52; R.S.S. ch. 62, sec. 8; R.S.S. ch. 108, sec. 51, considered; *R. v. Cantillon*, 19 O.R. 197, and *R. v. Skinner*, 9 Can. Cr. Cas. 558, distinguished.]

3. SUMMARY CONVICTION (§ VI—60)—SPECIAL ACT MAKING FINE PAYABLE TO MAGISTRATE—FORMAL CONVICTION.

Where the statute under which the summary conviction is made directs that the fine shall be payable to the convicting magistrate, there is no necessity for a direction in the formal conviction that the fine should be paid to him.

4. CERTIORARI (§ II—28)—DIRECTING AMENDMENT OF SUMMARY CONVICTION—STATING THE OFFENCE—PRACTISING DENTISTRY.

An objection that a conviction for unlawfully practising dentistry in contravention of the Dental Profession Act, R.S.S. ch. 108, does not specify the particular acts which constituted the alleged practising, may be remedied on *certiorari* by the Court directing an amendment of the conviction so as to insert a statement of the several acts shewn in the evidence to have been committed by the defendant, if the Court finds that the magistrate had jurisdiction and that an offence was committed of the nature specified in the conviction.

[Cr. Code sec. 1124; *R. v. Coulson*, 1 Can. Cr. Cas. 114, applied; *R. v. Harris*, 13 Can. Cr. Cas. 393, referred to.]

DECIDED: January 11, 1915.

MOTION to quash a certain conviction made against C. S. Schilling (applicant herein), who was defendant in a prosecution at the instance of one William D. Cowan (informant), before William Trant, Esquire, one of his Majesty's justices of the peace, in and for the province of Saskatchewan.

P. M. Anderson, for applicant.

H. F. Thomson, for the informant.

W. Geddes, for the magistrate.

HAULTAIN, C.J.:—The most important objection to this conviction is that the evidence does not disclose an offence under the Dental Profession Act (ch. 108, R.S.S.), inasmuch as there is no evidence of practising for hire, gain, or hope of reward. In my opinion there is a *prima facie* case. The evidence shews that the defendant practised dentistry and dental surgery and charged fees for his services. There is some evidence that a Dr. Robinson, of Winnipeg, had some connection with the business, but what that connection is does not appear. The defendant did the work, fixed the fee, and, so far as the evidence goes, controlled and disbursed the moneys received by him for his services. There is some suggestion in the evidence that Dr. Robinson had something to do with the business, but what his interest is does not appear. Miss Partridge, the office clerk, seems to have had some instructions from Dr. Robinson, but she was under the control of the defendant, took her instructions and received her pay from him. The fact that the account was kept in Robinson's name does not, in my opinion, make any difference, as the defendant, according to the evidence, kept the account at the bank and drew cheques on it. The whole affair, to my mind, is an attempt on the part of Robinson to reap a little benefit by allowing an unqualified man to evade the law under cover of his name. In any event there is no evidence that Robinson is licensed to practise in Saskatchewan, and the onus was on the defendant to establish that. (See sec. 54, Dental Profession Act).

I am, therefore, satisfied that an offence of the nature described in the conviction has been committed. I am also satisfied that the punishment imposed is not in excess of that which might have been lawfully imposed for the offence in question.

Objection has been taken that there is no provision for distress in default of payment of the penalty and costs, as provided by sec. 51 of the Dental Profession Act. Reading sec. 52 of the Interpretation Act (ch. 1, R.S.S.), and sec. 8 of the Magistrates' Act (ch. 62, R.S.S.), in conjunction with sec. 739 of the Criminal Code, I am of opinion that the magistrate had power to order imprisonment forthwith in default of payment of the penalty and costs, notwithstanding the fact that sec. 51 provides a special mode of levying the same by distress.

The case of *Reg. v. Cantillon*, 19 O.R. 197, was cited in support of the objection, but that case was decided before sec. 739 (b) of the Criminal Code was enacted. *Rex v. Skinner*, 9 Can. Cr. Cas. 558, and a number of cases cited therein, were all decided under sec. 744 of the Criminal Code, and do not apply to a conviction made under sec. 739 (b). The amended conviction provides for the costs and charges of commitment and of conveying to gaol. By the Dental Profession Act, ch. 108, sec. 52, the fine is clearly payable to the convicting magistrate, so that there is no necessity for a direction in the conviction as to whom the fine should be paid.

The only other objection which it is necessary for me to consider is the objection that the conviction does not specify the particular act or acts which constituted the alleged practising of dentistry. On this point the cases of *Reg. v. Coulson* (1893), 1 Can. Cr. Cas. 114; *Smith v. Moody*, [1903] 1 K.B. 56, 20 Cox C.C. 369; *R. v. Harris* (1908), 13 Can. Cr. Cas. 393, were cited, among others.

I am inclined to think that the conviction is bad on the ground stated, but, as I find that the magistrate had jurisdiction, and that an offence was committed of the nature specified in the conviction, this defect can be remedied by amendment. (*Per* Armour, C.J., in *Reg. v. Coulson*, *supra*, at p. 117.) I will accordingly amend the conviction by inserting in the appropriate place a statement of the several acts shewn to have been committed by the defendant in the evidence.

For the foregoing reasons this application must be refused, but without costs.

Conviction amended.

[SUPREME COURT OF ALBERTA.]

JUDICIAL DISTRICT OF CALGARY.

BEFORE SCOTT, BECK, STUART AND SIMMONS, JJ.

WAH KIE v. CUDDY.

(Decision No. 2.)

1. SEARCH AND SEIZURE (§ I—10)—SEARCH WARRANT ON GAMING-HOUSE CHARGE—PRODUCING WARRANT.

In the execution of a search warrant on a gaming-house charge under Cr. Code, sec. 641, where the place is not a dwelling house or part of a dwelling house, the police officer executing it must have the search warrant with him in order to exhibit it for inspection if asked for, but it is not obligatory where it is not a dwelling house that the officer should first demand an entrance or signify the cause of his coming before breaking in.

[*Wah Kie v. City of Calgary and Cuddy*, 23 Can. Cr. Cas. 325, affirmed; *Hodder v. Williams*, [1895] 2 Q.B. 663, referred to.]

2. SEARCH AND SEIZURE (§ I—10)—FORCE IN EXECUTING SEARCH WARRANT.

An officer executing a search warrant is protected only in so far as he uses no more force than under the circumstances is reasonably necessary.

DECIDED: December 18, 1914.

APPEAL from the decision of Harvey, C.J., at the trial without a jury dismissing the action with costs: *Wah Kie v. City of Calgary and Cuddy*, 23 Can. Cr. Cas. 325.

A. A. *McGillivray*, for plaintiffs, appellants.

C. J. *Ford*, for defendant Cuddy, the respondent.

The judgment of the Court was delivered by

BECK, J.:—The action is one of trespass against the Chief Constable of the City of Calgary.

The facts briefly are as follows:—

The plaintiffs are the owners, as trustees for a lodge of Chinese Masons, of premises in Calgary described as 107 Second Avenue West. The building was a two-storey building. There were two street doors, a few feet apart, one as an entrance to the ground floor and the other to the upper floor. There was no internal stairway. The upstairs consisted of a large hall or assembly room with a small room adjoining; it was here that the regular

meetings of the lodge were held. The lower storey consisted of an ante-room in front and a large hall in the rear. This was used for open meetings of the lodge and as a general recreation room for reading and playing cards, etc. To the large room there was a door in the rear opening upon a lane.

On the 17th of October, 1913, the defendant Cuddy made a report in writing to the police magistrate that there were good grounds for believing and that he did believe that the premises, 107 Second Avenue East, Calgary, were being kept and used as a common gaming house as defined by sec. 226 of the Criminal Code. Upon this report the police magistrate made an order addressed to the defendant in the following terms: "I hereby authorize you, the Chief Constable, or Inspector or Sergeant of the Calgary Police Force, to enter the premises of 107 Second Avenue East with such constables as are deemed requisite by you or him, and if necessary to use such force for the purpose of affecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who are found therein and to seize all tables and instruments of gaming and all money and security for money found on such premises and to bring the same before me or such other justice as may be presiding in my stead, to be by me or him dealt with according to law." The authority for such an order as well as the duty of the person authorized by the order is outlined in sec. 641 of the Criminal Code: "If the Chief Constable . . . reports in writing to . . . the police . . . magistrate . . . that there are good grounds for believing and that he does believe that any house room or place . . . is kept or used as a common gaming . . . house as defined in sec. 226 . . . such . . . police . . . magistrate . . . may by order in writing order the Chief Constable . . . to enter any such house, room or place with such constables as are deemed requisite by him, and if necessary to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who are found therein, and to seize, etc.

"2. The Chief Constable . . . making such entry in obedience to any such order may, with the assistance of one or more constables, search all parts of the house, room or place which he has so entered where he suspects that tables or in-

struments of gaming . . . are concealed, and all persons whom he finds in such house or premises and seize all tables and instruments of gaming . . . which he so finds."

It is, I think, important to note also the severity of the consequences following upon the execution of such an order for search.

Section 642 authorizes the examination under oath of any person found on the premises and apprehended in pursuance of the order.

Section 986 provides that in any prosecution under sec. 228 for keeping a common gaming house or under sec. 229 for playing or looking on while any other person is playing in a common gaming house it shall be *prima facie* evidence that a house, room or place is used as a common gaming house and that the persons found therein are unlawfully playing herein—

(a) If any constable or officer authorized to enter such a house, room or place is wilfully prevented from or obstructed or delayed in entering the same or any part thereof; or

(b) If any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming or with any means or contrivance for concealing, removing or destroying any instrument of gaming.

In executing the search order in this case, the defendant Cuddy went with a number of constables to the premises in question. Cuddy and one or two of the constables remained at the front street door, and he sent some of the other constables around the building to the back door.

The evidence as to what was done is briefly as follows: The front door was tried; it was found to be locked; the handle was turned several times; they knocked; they waited a few moments; then with an axe a corner of the upper portion of the door, which was of glass, was broken, and through the hole then made, the key which was in the lock inside, was turned and thus entry obtained.

One of the constables who went to the back of the building and said that he had been to the place once or twice before, and that the windows were then let down from the top, and by standing on the ledge one could see what was going on in the room; that on this occasion they were closed, and, being "frosted," he could not see in; and that he therefore broke a pane in order to see what was going on. He said he did this because one of the other

constables had tried the back door and found it locked—"So I ran up the stairs and broke the glass so that I could see in, because if you don't get in in time everything will be cleaned off the tables." One of the constables tried to break open the back door—first trying to open it by the handle, and then hammering it so that a panel was cracked; he was stopped by a constable who had entered by the front door.

The question in the case is, was force to this extent justified under the circumstances by the order for search. The Criminal Code (sec. 629 *et seq.*) provides for the issue of search warrants in a variety of cases.

The common law authorized the issue of a search warrant only in the case of larcency or suspected larcency: 9 Halsbury Laws of England, tit. Criminal Law and Procedure, p. 625; 22 *Ib.* tit. Police, p. 4986c; Encyclopædia of the Laws of England, 2nd ed., vol. 13, tit. "Search Warrants," p. 199, and cases there cited.

We were referred to the third resolution in *Semayne's Case*, 5 Coke 91, 1 Sm. L. Cases, 11th ed., p. 105:—

"In all cases when the King is a party, the sheriff (if the doors be not open) may break the party's house either to arrest him or to do other execution of the King's process if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming and to make requests to open the doors.*" And it is urged that in execution of a search warrant the police officer was bound as a thing preceding the search to signify the cause of his coming and to make request to open the doors before being entitled to make the search.

This resolution, however, refers to process, *e.g.*, a warrant which does not expressly give the right to enter, as does a search warrant. Again it refers to a house—a dwelling house. What is in question here is a room for occasional or habitual assembly only.

In *Codd v. Cave* (1876), 1 Ex.D. 352, it was held that when a warrant has been issued to apprehend a person for an offence for which he cannot be arrested without a warrant, the police officer must have the warrant in his possession at the time of the arrest ready to be produced if inspection of it is asked.

I think a similar rule applies to a search warrant.

The first preliminary, therefore, to the execution of a search

warrant is, I think, that the police officer should have the warrant in his possession at the time of the search.

Launock v. Brown (1819), 2 B. & Ald. 593, 106 E.R. 482, was a case of a search warrant under a statute (22-23 Car. II., ch. 25, sec. 2) which empowered game keepers and other persons, authorized by warrant under the hand and seal of any justice of the peace for the county in the day time to search the houses, outhouses or other places of certain persons for guns, bows, greyhounds, etc., and to seize, detain and keep the same, etc. The Court *en banc* of four Judges, affirming the decision of the trial Judge, held that a search warrant under the statute was unlawfully executed inasmuch as no demand of admittance had been made before breaking open the outer door of the dwelling house of the plaintiff's house.

I think this rule is applicable to all search warrants or orders for search unless it is clear from the statute authorizing the search warrant that a demand to open is not necessary. The second preliminary, therefore, I think, to the execution of a search warrant, is, generally speaking, *when the place is to be searched is a dwelling house*, is a demand to open.

In *Hodder v. Williams*, [1895] 2 Q.B. 663, the statement made in Smith's Leading Cases in the notes to *Semayne's Case* is approved: "The maxim that 'a man's house is his castle' only extends to his dwelling house; therefore a barn or outhouse, not connected with the dwelling house, may be broken open in order to levy an execution (*Ponton v. Brown*, 1 Sid. 181, 186), but not to make a distress for rent: *Brown v. Glenn*, 16 Q.B. 254."

In that case the plaintiff, who was a coach builder, for the purposes of his business occupied buildings as a workshop and for storage of goods, no one living there. Counsel for the plaintiff argued that the reasons given for the doctrine of *Semayne's Case* apply to a building like a shop or warehouse in which the owner or his servants would be likely to be when it is forcibly entered as much as to a dwelling house. The Court declined to accede to this argument. Lord Esher, M.R., said: "None of the authorities on the subject draw any such distinction as was suggested in argument between a building such as a shop or warehouse and a barn or outhouse. The only distinction drawn is between a dwelling house and a building which is not a dwelling house."

The last rule, therefore, which I have set down does not, I think, apply except in the case of a building, room or place used as a dwelling in the ordinary acceptance of the word.

So I conclude that in the execution of a search warrant or order for search, where the place is not a dwelling house, or a room or other place—"parcel of a house" (*Denton v. Brown*, 1 Keb. 698, 1 Sid. 186)—the police officer executing it must have the search warrant with him, in order to exhibit it for inspection if it is asked and in that case produce it and permit inspection of it, but he need not under all circumstances first demand an entrance or signify the cause of his coming.

Nevertheless, every officer acting under warrant or other lawful authority is protected only in so far as he uses no more force than under the circumstances is reasonably necessary, and is liable in trespass for any excess: 23 Halsbury's Laws of England, p. 812, and cases there cited. The statute under which the order for search was made expressly authorizes the person to whom the order is directed "if necessary to use force for the purpose of effecting such entry." When it is necessary to use force to effect an entry must depend upon the circumstances of each particular case. If it is the case of a dwelling house, much more circumspection would be called for than in the case of another class of building. A different case of conduct might reasonably be looked for in a case where the building is occupied and where it is not.

I think one should not be curious or astute to find an excess where the officer appears to have acted *bonâ fide*. I cannot find *mala fides*, and I am not inclined to find that under all the circumstances appearing in the present case there was an excess of force.

I think, therefore, the judgment of the learned Chief Justice dismissing the action with costs should be affirmed with costs.

Appeal dismissed.

[SUPREME COURT OF ALBERTA.]

JUDICIAL DISTRICT OF CALGARY.

BEFORE SIMMONS, J.

REX v. HURST.

1. ARREST (§ I B—9)—ILLEGAL ARREST ON FIRST CHARGE—CONVICTION MADE ON SECOND CHARGE ONLY—DISMISSAL OF FIRST CHARGE.

The fact that the accused had been illegally arrested without a warrant on a charge which was dismissed, and that pending the hearing another charge was laid for a different offence, will not deprive the magistrate having jurisdiction in respect of time and place over the latter offence from proceeding to trial and conviction where objection was raised only in that case and not in the case upon the prior charge which was dismissed.

[*R. v. Hughes*, 4 Q.B.D. 614, *R. v. Paul*, 20 Can. Cr. Cas. 159, 7 D.L.R. 24, followed; *Pearks v. Richardson*, [1902] 1 K.B. 91, distinguished.]

MOTION on *certiorari* to quash defendant's conviction by a police magistrate for having opium in his possession contrary to the Opium and Drug Act, Can.

J. J. Barron, for the accused.

J. Shaw, for the Crown.

SIMMONS, J.:—This is an application by *certiorari* to quash a conviction of the police magistrate.

The defendant Joseph Hurst was arrested in the city of Calgary on the evening of November 7, 1914, on a charge of vagrancy under sec. 238 (1) of the Criminal Code. The arrest was made without a warrant, and it is admitted that for this reason the arrest was illegal. On November 9, the defendant appeared (without protest) before Gilbert E. Saunders, police magistrate in the city of Calgary, and this charge was dismissed.

Before the said charge was disposed of a charge was laid against the defendant of having opium in his possession contrary to sec. 3 of the Opium and Drug Act. Upon this charge he was convicted and sentenced to two months' imprisonment.

On the trial of this charge the defendant's counsel objected to the jurisdiction of the magistrate on the ground that the defendant was illegally arrested without a warrant.

In *Rex v. Baptiste Paul*, 20 Can. Cr. Cas. 159, 7 D.L.R. 24, I expressed the view that if the magistrate had jurisdiction over the matter it was immaterial how the defendant was brought before him. In that case I followed *The Queen v. Hughes*, 4 Q.B.D. 614.

In *The Queen v. Hughes* the majority of the Judges held that the defendant having failed to object to the jurisdiction it could not be subsequently raised if the justices had jurisdiction over the matter. But the majority of the Judges went further and expressed the view that as soon as the defendant was brought before the justices, if they had jurisdiction over the subject matter it was immaterial as to how the defendant was brought before them.

"I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, was brought by force, or under an illegal warrant is immaterial," being brought before them the Justices (however brought there), if they had jurisdiction, in respect of time and place over the offence, were competent to entertain the charge; per Lopes, J.

Hawkins, J., expressed a similar view, and Pallock, B., and Lindley, J., concurred.

In *Rex v. Baptiste Paul*, 20 Can. Cr. Cas. 161, 7 D.L.R. 25, my brother Beck took a different view, citing *Pearks Limited v. Richardson*, [1902] 1 K.B. 91.

With much respect, I do not think Lord Alverstone, C.J., asserts any principle in this judgment contrary to the views of the Judges in *The Queen v. Hughes*, 4 Q.B.D. 614,

Section 62 of the Companies Ordinance required service in a civil process to be made, in a certain way. The judgment in the case [*Pearks v. Richardson*] went no farther than to say that in the absence of any legislative authority or any ruled practice made by competent authority the service of a summons upon a company in a summary prosecution for violation of a local statute should be made in the manner prescribed by sec. 62 of the Companies Ordinance. There was nothing more than the enunciation of rule of practice to the effect that legislation had provided for service to be made upon an incorporated company in a civil proceeding in a certain way, and that in a summary proceeding for violation of a statute the same practice should be followed. A

company cannot be served in the way a person is served, and of necessity some officer of the company must be served on its behalf.

In the case before me the material does not disclose that any objection was made to the jurisdiction of the magistrate when the defendant was charged with vagrancy.

The affidavit of James Duguid, police court clerk, merely says: "That the charge of vagrancy against the accused was disposed of and upon that charge he was dismissed."

Not having raised the question of the illegality of the warrant upon which he was arrested upon the charge of vagrancy when he came before the magistrate upon that charge, he cannot raise it now: *The Queen v. Hughes*, 4 Q.B.D. 614.

I would therefore dismiss the application with costs.

Conviction affirmed.

[SUPREME COURT OF ALBERTA.]

BEFORE MCCARTHY, J.

TAMBLYN v. WESTCOTT.

1. EVIDENCE (§ IV E—411)—JUDICIAL RECORDS—TERMINATION OF CRIMINAL PROSECUTION.

The termination of a prosecution by withdrawal of the charge before the justice may be proved without any formal record or certificate as a basis for an action for malicious prosecution.

[*Atty.-Gen. v. Scully*, 6 Can. Cr. Cas. 167, 4 O.L.R. 394; *Fancourt v. Heaven*, 18 O.L.R. 492; *Beemer v. Beemer*, 9 O.L.R. 69; *Baxler v. Gordon, etc., Co.*, 13 O.L.R. 598; and *Mortimer v. Fisher*, 11 D.L.R. 77, discussed; *R. v. Ivy*, 24 U.C.C.P. 78; *Hewitt v. Cane*, 26 Ont. R. 133; *McCann v. Preveneau*, 10 Ont. R. 573; *Goddard v. Smith*, 6 Mod. 262, disapproved.]

2. MALICIOUS PROSECUTION (§ III—20)—TERMINATION OF PROSECUTION—PROOF WITHOUT PRODUCTION OF RECORD.

In the absence of proof that the withdrawal of the prosecution was brought about by a compromise or arrangement to which the accused was a party proof of such withdrawal is a termination of the prosecution in favour of the accused.

[*Mortimer v. Fisher*, 11 D.L.R. 77, applied.]

ARGUED: November 13, 1914.

DECIDED: December 31, 1914.

THIS was an action brought by plaintiff to recover damages for malicious prosecution. Plaintiff is a commission agent, carrying on business in Edmonton. On the 30th of May, 1914, the defendant caused the plaintiff to be arrested and brought before the magistrate on a charge that the plaintiff on the 23rd of May, 1914, unlawfully obtained from Westcott the sum of \$450.00 by false pretences and with intent to defraud. Tamblyn was obliged to secure bail, and upon appearing at the police court next day found that the charge had been withdrawn. Plaintiff then sued for damages of \$1,000. Judgment was given for the plaintiff for \$250 damages and costs.

John Cormack, for plaintiff.

S. S. Dickson, for defendant.

MCCARTHY, J.:—This is an action brought by the plaintiff to recover damages for malicious prosecution. The action came on for trial before me at the sittings of the Court held at Edmonton on the 13th day of November, 1914. The evidence adduced by the plaintiff did, to my mind, prove malice and want of reasonable and probable cause on the part of the defendant. The plaintiff tendered as evidence of the termination of the proceedings the original information with the following words written immediately after the form of charge in the information: "Charge read, information withdrawn"; signed, "George Westcott." George Westcott is the defendant in this action.

It was contended by counsel for the defendant that this was not sufficient evidence of the termination of the proceedings.

The result of the more recent authorities is that the termination of the proceedings in favour of the accused may be proved by evidence other than the formal record or certificate of acquittal.

For a long time in the Province of Ontario it was held to be the law that it was necessary to produce the record of the proceedings where the trial had been on an indictment and that before the record could be made up it was necessary to procure an order of the Judge presiding at the criminal trial or the fiat of the Attorney-General before the Clerk of the Peace could make up the record. See *Regina v. Ivy*, 24 U.C.C.P. 78, and *Hewitt v. Cane*, 26 O.R. 133. These cases were in effect overruled by the

decision in *Attorney-General v. Scully*, 6 Can. Cr. Cas. 167, 4 O.L.R. 394. It was during the time when the stricter view of the law was adhered to that such cases as *McCann v. Preveneau*, 10 O.R. 573, was decided. But even during this time it had been held in *Sinclair v. Haynes*, 16 U.C.R. 247, where the charge had been before Magistrates, that it was unnecessary to shew any record or adjudication in writing.

At one time it was also held that the entry of a *nolle prosequi* was not a sufficient termination to found an action for malicious prosecution, for the reason that a new charge might subsequently be laid: *Goddard v. Smith*, 6 Mod. 262. The contrary view was, however, held in *Gilchrist v. Gardner*, 12 N.S.W.L.R. 184, and it has been held in Saskatchewan that the direction of the Attorney-General to his agent not to prefer a charge after a committal for trial has been had is a sufficient termination. (See *Mortimer v. Fisher*, 11 D.L.R. 77.)

In *Beemer v. Beemer*, 9 O.L.R. 69, oral proof of an informal termination of the prosecution was admitted and held sufficient. Indeed, in that case it was not at all clearly shewn how the proceeding had been in fact terminated.

The judgment of Anglin, J., in *Baxter v. Gordon Ironsides & Fares Company*, 13 O.L.R. 598, is not opposed to this view. In that case it was proved that the termination had been brought about by a compromise or arrangement between the parties, and the magistrate had indorsed on the information "settled out of Court." The ground of the decision was that such a termination was not one *in favour of* the accused. Anglin, J., at p. 600, however, says: "It is conceded by the defendants that the abandonment of a prosecution by the complainant or the entry of a *nolle prosequi* by the representative of the Crown—if not the result of some compromise or arrangement with the accused—is a termination of the proceedings."

In *Fancourt v. Heaven*, 18 O.L.R. 492, it was held that the withdrawal of the charge in open Court by the Crown Attorney was a sufficient termination.

On the reasoning in such cases as *Fancourt v. Heaven*, 18 O.L.R. 492, *Mortimer v. Fisher*, 11 D.L.R. 77, and *Beemer v. Beemer*, 9 O.L.R. 69, I think that, in the absence of proof that the withdrawal of the prosecution was brought about by a com-

promise or arrangement to which the accused was a party, the termination in favour of the accused (i.e., the plaintiff) has been shewn, and as in my view there was a lack of reasonable and probable cause for the institution of the proceedings and malice or at least an improper motive (see *Wood v. Newby*, 21 W.L.R. 438), I give judgment for the plaintiff.

As to the question of damages, apparently the plaintiff was detained in custody for a very short time. He appeared at the office of the Chief of Police, and was obliged to obtain bail on the Saturday evening in question, and he appeared for his preliminary hearing on the following Monday, when the charge was withdrawn.

I give judgment for the plaintiff for \$250 damages and there will be costs to the plaintiff in accordance with column 2 of schedule "C" of the Rules as to costs without set-off.

Judgment for plaintiff.

[SUPREME COURT OF CANADA.]

BEFORE SIR CHARLES FITZPATRICK, C.J., AND IDINGTON,
DUFF, ANGLIN, AND BRODEUR, J.J.

BEAMISH v. RICHARDSON.

1. BROKERS (§ I—2)—GRAIN EXCHANGE—SALES ON MARGIN—WAGERING CONTRACTS—CR. CODE, SEC. 231.

Where neither the customer or the broker, in respect of transactions of purchases and sales to be made on a "grain exchange," has in contemplation that delivery of the grain sold should be made or taken under the agreements purporting to be contracts for the sale or purchase of the grain, as the case may be, but it was intended to meet the obligation to deliver by an off-set of a contract to purchase a like quantity of grain and to adjust the differences between the selling and buying prices, the dealing in such differences to make gain or profit by an anticipated rise or fall in the price of the grain is illegal under Cr. Code, sec. 231.

[*Richardson v. Beamish*, 21 Can. Cr. Cas. 487, 13 D.L.R. 400, 23 Man. L.R. 306, reversed on appeal.]

2. BROKERS (§ I—1)—CLEARING HOUSE—OPTION DEALS.

The customer buying and selling options through a broker on a grain exchange in connection with which there was a clearing house association, of which his broker was a member, but which association did not include all the members of the "exchange," is not to be assumed to have authorized his broker to close transactions through the clear-

ing house under a system the effect of which would be that no one but his broker became directly responsible to him and that the so-called purchases and sales on the exchange made by the broker were set-off one against the other so that they became closed by an adjustment of accounts between the clearing house and the broker without regard to the customer; and apart from the question of illegality under Cr. Code, sec. 231, and as regards a customer having no notice of the methods employed, there was a failure to carry out what the broker was commissioned to do under the customer's orders to buy and sell grain on margin for future delivery although it was stipulated that "all purchases and sales are made in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange."

[*Richardson v. Beamish*, 21 Can. Cr. Cas. 487, 13 D.L.R. 400, 23 Man. L.R. 306, reversed on appeal.]

ARGUED: February 13, 14, 1914.

DECIDED: May 18, 1914.

APPEAL by defendant (Beamish) from the judgment of the Court of Appeal for Manitoba, *Richardson v. Beamish*, 21 Can. Cr. Cas. 487, 23 Man. L.R. 306, 13 D.L.R. 400, affirming the judgment of Mathers, C.J., at the trial, by which the action of plaintiff company (James Richardson & Sons, Limited) for broker's margins, was maintained with costs.

W. A. T. Sweatman, for the appellant.

Chrysler, K.C., and *E. A. Cohen*, for the respondents.

FITZPATRICK, C.J. (dissenting):—I would dismiss this appeal with costs.

IDINGTON, J.:—This is an action by an agent to recover from his principal moneys expended in his service.

The respondent as a commission merchant was instructed from time to time either to buy or sell, as directed, wheat and other grains on the Winnipeg Grain Exchange. The ordinary agency in way of buying and selling anything does not give rise to implications out of which can arise claims for reclamations by the agent. Either the agent is directed merely to make the bargain as directed, to buy and pay for or sell, and there the matter rests.

But, on change, there has arisen a practice of buying and selling of options, and a custom of the agent advancing the needed cash, called margins, for the purpose of securing or of protecting

the bargain and out of this peculiar form of agency often arise claims by way of reclamations.

The claim made herein is for a series of reclamations arising out of such mode of dealing. The parties are agreed, so far, that the law declares in such case that the agent has implied authority to act according to the usage and customs of the particular place, market or business in which he is employed, provided that no agent has implied authority to act in accordance with any usage or custom which is unreasonable unless the principal had notice of such usage or custom at the time when he conferred the authority.

Applying this to the facts, it is clear that as regards the several dealings in question, in which the respondent acted as agent, it expressly represented, time and again, that the dealing entered upon was as follows:—

“On all marginal business we reserve the right to close transactions when margins are running out, without further notice. All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange.”

On these rules alone the bargains made would each have created a privity of contract between the appellant principal and some one else to whom he could have looked and to whom he would have been bound.

None of the transactions in question here were allowed to remain in that simple primitive condition which the observance of these rules and ancient well-known usages would have produced.

A few years before these dealings, the “Clearing House,” known as “The Winnipeg Grain and Produce Clearing House,” was incorporated. Any member of the voluntary association known as “The Winnipeg Grain Exchange,” referred to in the above-quoted memo., could become a member of this Clearing House.

But all the members of the Grain Exchange were not members of the incorporated Clearing House. The latter had a peculiar set of by-laws which no doubt bound its own members to each other, but could not bind others unless expressly or impliedly assenting to be so bound.

I shall not enter into the details of the system, for I find the

learned counsel engaged in this case are very wide asunder not only as to the law, but the essential facts relative to the consequence of members of this Clearing House using its machinery and dealing through means thereof with bargains made between them on the "Exchange"; and I find the learned Judges in the Court below seem to be in as hopeless a sort of disagreement in same regard as counsel in the case; and, to crown all, counsel for respondent will not accept the evidence of its own manager as to the position in which the practice and dealings of its members are supposed to have brought their respective clients in relation to contracts on their behalf when dealt with by means of this Clearing House.

Indeed, we are invited to determine that matter by the construction of a few obscurely worded rules and, in doing so, to first determine that the meaning thereof is that which will best serve the purposes of respondent in this appeal; and next, under such circumstances, to find that appellant must be held bound by reason of his knowledge, or duty to know of the existence of such a Clearing House and its uses, and the legal consequence of such use, as part of the usage and custom of the Grain Exchange on which he authorized respondent to deal for him. There is not a word of evidence to shew appellant had ever heard of such an institution or knew anything of its uses and the consequences of such use. His examination for discovery is put in, so far as serving respondent's purpose, and a perusal of it leads me to conclude that all his apparent knowledge of the Grain Exchange was at best shallow; and it by no means leads me to conclude that he ever got beyond very old-fashioned notions of the business he was engaged in when entering on the dealings now in question.

To impute to such a man knowledge of what his agent would be likely to do in regard to the Clearing House seems absurd. And if the radical differences of opinion amongst those likely to know about such a mode of doing business which I have presented do not demonstrate how unreasonable it would be to bind an ignorant man to its adoption, I imagine I should fail if I attempted further elaborate demonstration.

The ordinary man cannot realize the existence of a contract without its continuation till ending in the ordinary way. It is contended that the twenty-four contracts involved herein each

ended in some sort of novation by which the party with whom in each case appellant was brought into some contractual relation either as buyer or seller became discharged almost immediately after the contract had been framed.

And it is said the Clearing House corporation became substituted in and by such novation as either buyer or seller as suited the exigencies of the case.

That is the position taken by counsel for the respondent, and it has some colour of support in one if not more of the opinion judgments in the Court below.

But the respondent's manager, who took part in these deals and was at the time of giving evidence herein president of this Clearing House Association, and I infer, from a reading of his evidence, was possessed of a clear head, says:—

“Q. In other words, two days later Bingham may have closed the transaction so far as he was concerned? A. Yes; of course his position would be the same as ours. The purchase he made from another may have cancelled some deal he had outstanding, and he may have cleared on the Clearing House that day. . . .

“Q. And the clients would look to you and no one else? A. Yes.

“Q. No one else would be responsible to the clients except you? You alone would be responsible to the clients? A. We are in every case. They can only look to us; they cannot look to the Clearing House.”

The result would seem to be, as the man best fitted to know thus explains it, that there was by means of the ingenious and beneficent plan of the Clearing House a method whereby the commission agent and his clients could by due process of law form an apparently contractual relation between them, as basis for betting against the rise and fall of the market without the annoyance of being troubled by others, and the Clearing House be a good and safe place for recording the bet, and, barring some occasional accidents, form a stakeholding security.

At least such is what the appellant charges and relies upon as his second line of defence resting upon the sec. 231 of the Criminal Code, which, abbreviated, is as follows:—

"Every one is guilty of an indictable offence . . . who . . . (a) without the *bond fide* intention of acquiring any such . . . goods, . . . or of selling the same . . . makes . . . any contract . . . purporting to be for the sale or purchase . . . of any . . . goods . . . ; or, (b) makes . . . any contract . . . purporting to be for the sale or purchase of any such . . . goods . . . in respect of which no delivery of the thing sold or purchased is made or received, and without the *bond fide* intention to make or receive such delivery."

The contention of respondent, either through its witness or counsel, as to the consequences of dealing through the machinery of the Clearing House, if correct, produces a situation that better lends itself to the operating of a system of betting or wagering than the old system of treating the contracts, as between the buyer and seller, as being kept on foot.

But the most significant fact bearing upon the essential question of whether or not these transactions were intended to be mere wagering transactions is that we have presented at least twenty-four transactions between the parties hereto in which alleged contracts of selling and buying are apparently involved, yet not one of them resulted in the transfer and delivery of a single pound of goods of any kind. Surely it is asking too much of us to believe that the sale and form of delivery in all these cases was made with the *bond fide* intention to make or receive such delivery as the law contemplates, and that in such a mass of cases it so signally failed of fruition in a single instance.

There is, however, more than that curious and continuous unbroken chain of business dealings between these parties to be considered; for we find that the very first contract, in January, 1910, was one of a sale for delivery in the future of "May wheat," and long before the time for delivery had arrived, indeed, within a few days, another alleged contract is made for the purchase of exactly the same quantity of wheat, ostensibly bought for "May delivery," and these parties seem to have set the one off against the other and settled on that basis, allowing a small item of profit as the result to the appellant.

An examination of other similar transactions and reckoning shews this process was gone through and a settlement arrived at,

on the like basis and through the like methods, long before the respective times at which the future delivery ostensibly contemplated by the form of the transaction had arrived. Whether all were recorded in the Clearing House or not does not appear.

In some ancient temples we are told ceremonies were performed which no one but the initiated were supposed to behold or quite understand, and outside that charmed circle the whole performance was treated with that respectful awe which is ever due to mystery. In this modern temple probably some consecrated symbolical delivery takes place accompanied with appropriate ceremony. No ruthless hand has dared to lay bare before us exactly what form or symbol was substituted and accepted by the faithful as something they may call, and swear, to be delivery of that grain; in the clouds or four hundred miles away.

It never, in transactions such as presented herein, moves out of the warehouse or helps to propel the wheels of commerce. But the chips change sides and the bank accounts are expected to do the rest.

I assume the usual ceremony or form was gone through on twenty-four successive occasions. No one saw, or felt, or ever handled a pound of grain or flax in any single instance! This was not, I imagine, all accidental, but a mere using of the forms of the law to promote an illegal purpose present to the minds of those concerned. And the methods used and consequences involved in the use of the machinery provided by the Clearing House and its system facilitated this mode of mere wagering.

I am not to be understood as alleging that the Clearing House and its system is used solely for that purpose and is not used for an honest and most beneficent purpose. But, when asked to find that it was not used for such wagering purpose and could not be so used, I must say that to ask so much seems like trading on one's credulity, in face of the facts presented. As I read the statute it fits these facts.

It is idle to call a mere symbolical form, never intended to result in anything but a change in the bank ledger containing records of the gains and losses of those concerned, a delivery or evidence of intention to make or receive delivery.

There is a letter from appellant which opens the dealing in flax that is relied upon as lending colour to the abandonment

of the vicious system pursued in the eighteen wheat deals which had preceded it. If the flax sale had taken the form that it might have done, or, by any reasonable interpretation of what transpired, have been attributed to a sale of flax grown or to be grown upon the farms in which appellant was interested, then I might have found some colour of reason for supposing the practices of a year's duration now spread out before us had been abandoned.

I can find nothing in the transaction to bear this out. I conclude that the appellant is entitled to succeed on both grounds taken, and that the reasoning of the learned Chief Justice of Manitoba both upon the facts and the law and application of the authorities he relies upon is well founded and that I accept to cover the ground which I have not dwelt upon in detail.

I think the appeal must be allowed with costs.

DUFF, J. (dissenting).—I think this appeal should be dismissed. My reasons for thinking that the plaintiff is chargeable in respect of the transactions upon which the action is based are so fully and satisfactorily stated in the judgments of Mr. Justice Perdue and Mr. Justice Cameron that I should not have considered it necessary to do more than simply express my concurrence in those judgments had it not been for the difference of opinion in this Court. The first point for consideration arises out of the position taken by the appellant that the transactions in course of which the moneys were paid for which he had been held responsible in the Courts below, were not within the scope of the respondent's employment. Reduced to its lowest terms, the appellant's contention upon this head could, perhaps, be stated in this way: The respondents were instructed by the appellant as *brokers* to buy or sell grain; under such instructions the authority of the respondents was limited to making contracts of sale or purchase in a representative capacity for and on behalf of the appellant, or to put it more concretely—it was the respondents' duty, and their authority was limited by this duty, in executing the instructions of the appellant, to constitute agreements of sale and purchase between the appellant as seller or buyer with a purchaser or seller, which contracts should be enforceable by the appellant as the respondents' principal, and in respect of which contracts, moreover, the rights of the appellant should not be affected by the state of the account

between the respondents or their clients and the other party, or parties, to the transactions. The process by which these legal incidents are said to be ascribable to the respondents' employment is something like this: First, it is said—and perhaps I ought to say assumed—that *prima facie* the respondents were employed as agents of the appellant to make contracts of sale or purchase for him as his representatives, and this is assumed to involve as a legal consequence the limitations upon the authority of the respondents above indicated in the absence of evidence proving the contrary, which, it is argued, is not forthcoming in this case.

I think this is not the right road of approach for arriving at the nature of the employment of the respondents. I will discuss later the decisions of the Courts upon which the appellant relies. In the meantime, for the purpose of stating my view as to the nature of the respondents' authority, I refer to a passage of the judgment of Parke, B., in *Foster v. Pearson*, 1 C.M. & R. 849, at 858 and 859, which indicates, I think, the point of view from which the evidence bearing upon the question ought to be examined. In point of fact, the respondents, as the appellant knew, were grain merchants carrying on business at many places in Canada in buying and selling on their own account and also as commission merchants. They were also commission merchants and members of the Winnipeg Grain Exchange, and the appellant dealt with them as such. The commissions they undertook for the appellant were to buy or sell grain "on margin" in the Winnipeg Grain Exchange, and they were, by the terms of the respondents' employment, to be executed according to the "rules, regulations and customs" of the Exchange. As regards the incidents of the respondents' employment in these circumstances, those observations of Baron Parke in the case above mentioned appear to me to be pertinent.

"The judgment in the case of *Haynes v. Foster*, 2 C. & M. 237 is treated in the argument for the defendant as establishing that it is a sort of *legal incident* to the character of a bill broker that he is to pledge the bills of each customer separately; but we think that such is not the fair meaning of the judgment, but that it is to be taken in connection with the evidence, and that all that was intended was this, that, in the absence of evidence as to the nature of such an employment, a bill broker

must be taken to be an agent to procure the loan of money on each customer's bills separately, and that he had, therefore, no right to mix bills together and pledge the mass for one entire sum. In truth, *a bill broker is not a character known to the law with certain prescribed duties; but his employment is one which depends entirely upon the course of dealing.* It may differ in different parts of the country; it may have powers more or less extensive in one place than in another: what is the nature of its powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place."

Instead of beginning with certain presumptions founded upon legal decisions with reference to states of fact, more or less remotely similar to that disclosed by the evidence in this case, I shall try to ascertain what the facts in evidence have to say as to the nature of the transactions contemplated by the appellant's instructions to the respondents to make sales and purchases for his benefit "in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange."

Connected with the Winnipeg Grain Exchange is an incorporated company, known as the Winnipeg Grain Exchange Clearing House Association, the members of which are necessarily members of the Grain Exchange. The function of the Clearing House Association is to "clear" transactions entered into between its members. Members of the Grain Exchange who are not members of the Clearing House Association were not entitled to avail themselves of the services of the latter. As to members of the Clearing House Association, it is their duty to report any transactions entered into between any two of them, within three-quarters of an hour after closing on the date of the transaction. The transaction is examined by the manager of the Clearing House Association and, if accepted by him, the Association itself intervenes, assuming towards the seller the obligations of buyer and towards the buyer the obligations of seller. The single contract between two members becomes decomposed into two contracts, the Clearing House Association being a party to each, in one case being seller and in the other case being buyer. For the purposes of these two contracts the price is the closing price of the day, and if that differs from the price in the original contract,

the difference is settled by payment in cash. This practice applies, of course, only to sales and purchases for future delivery. These contracts between the purchasing member, on the one hand, and the Association, and the buying member, on the other hand, and the Association, are, of course, subject to the rules of the Clearing House Association, and there are two points as to the effect of these rules which are important; indeed, it is upon these two points that the defence and the appeal are based. The first of these is that the Clearing House Association treats the buying member, or the selling member as the case may be, as the principal and the only principal in the transaction. It is admitted by Mr. Ruttan, the general manager of the respondents, that according to the system in force the Clearing House Association is not bound to recognize any client of any member. The next point is: according to the regulations of the Clearing House Association a settlement takes place each day between each member and the Association, which settlement is effected in this way. At the close of any given day each member is credited by the Association with the aggregate amount of any advance in that day's closing price of commodities in respect of which the member is seller over the closing price of the previous day, or debited, as the case may be, with the amount in the aggregate of the decline, while with regard to commodities in respect to which he is a purchaser the process is reversed. The difference between the credits and debits is paid to the Clearing House Association by the member or to the member by the Clearing House Association, according to the state of the account. In order to secure payments of differences by members, the manager of the Association is entitled to call upon members from time to time for reasonable "margins", which are placed to the credit of the members. In the event of a member failing to pay differences, or to produce margins, when called upon to do so, authority is conferred upon the manager of the Association by the by-laws, in respect of transactions in which the member is a seller, to produce commodities sufficient to fulfil such contracts, and, in respect of contracts in which he is buyer, to sell the commodities to which he is entitled. That, it appears to me, on careful reading of them, is the true construction of secs. 3 and 4 of by-law 14.

The sum of the matter as affecting the respondents' transac-

tions now in question is this: As regards sales a contract arose between the Clearing House Association and the respondent by which the Clearing House Association agreed to take delivery of a given number of bushels of grain at a certain future date and pay for them at the closing price of the date of the sale and to credit the respondents in the daily settlement with the decline in price (if any) for that day, while the respondents undertake to deliver on the named date and to account in daily settlement for the rise in price (if any) for that day and to provide margins when called upon. When the date for delivery arrives, the respondents are bound to deliver the commodity contracted for unless they have it at the Clearing House, *i.e.*, unless they have contracts entitling them to receive an equal amount from the Clearing House.

The incidents of a purchase are the same *mutatis mutandis*. As for the appellant (assuming the respondents are right), he had no right to enforce these contracts as against the Clearing House Association by which he would not be recognized; but, as between him and the respondents, he was entitled to have them carry out any transactions entered into for him so long as he furnished the required "margins," and to have the benefit of all profits arising from such transactions.

All contracts for delivery of commodities within the scope of the business of the Grain Exchange made between two members of the Grain Exchange who are also members of the Clearing House Association, being necessarily subject to the rules of the Clearing House Association, have the incidents, and the rights of the parties to them are held subject to the conditions just indicated.

It follows, of course, that any contract for sale or purchase of commodities for future delivery made by a commission merchant who is a member of the Clearing House Association with another member of the Clearing House Association, in execution of a commission to buy or sell such commodities, is necessarily affected by the same incidents. The question is whether transactions having such incidents are within the class of transactions contemplated by the appellant's instructions to the respondents.

For more than five years before the first of the transactions in question the appellant had been dealing in options on the

Grain Exchange. That he was familiar with the practice of depositing margins is shewn by the correspondence. He was also familiar with the practice of "closing-out" one transaction by entering into another; by off-setting a sale with a purchase and taking the profits. It seems reasonable to conclude from the whole correspondence touching these matters that the appellant knew perfectly well that when a sale was made for his benefit the purchaser was not looking to him as principal. It seems reasonably clear that he never entertained any idea of assuming any obligation to anybody but the respondents.

But it is not necessary to go so far as that. The appellant knew there was some system in operation among the members of the Exchange by which profits could be made through speculating in sales and purchases for future delivery; and it was this system he wished to take advantage of.

He desired and expected the benefit of all the advantages the respondents could offer their clients; he expected, doubtless, to have them act as they would act for themselves. If anybody had conceived the impracticable idea that, in executing his commissions they should buy only from persons who were not members of the Clearing House Association or sell only to such persons I think it is fair to assume he would have been the first to protest. Yet that would be the necessary effect of the appellant's construction by reason of the rigorous rule requiring all transactions between members of the Clearing House Association to be reported to the Association.

On a fair interpretation the stipulation that "all purchases and sales" are "made in accordance with and subject to the customs of the Winnipeg Grain Exchange" seems to authorize these transactions. It would assuredly not be "in accordance with" the "customs" of the Exchange for a member of the Clearing House Association, in executing commissions for a client, to confine himself in his dealings with persons not members of the Association; nor would it be "in accordance with" those customs for members of the Association to fail to report their transactions to the Association, and the requirement that a transaction between two members of the Association should be "made subject to the customs" of the Exchange would seem to import that a practice not only obligatory, but universally observed as regards such transactions, should be followed.

But it is said that there is a series of decisions which oblige us to hold that the duty of the respondents was to establish privity of contract between the appellant and somebody else in each one of these transactions. I think that is a proposition which cannot be sustained. Lord Blackburn, in his judgment in *Robinson v. Mollett*, L.R. 7 H.L. 802, pointed out that where a merchant instructs an agent in a foreign country to enter into a contract for him, the rule founded upon the presumed intention of the parties in the circumstances is that the agent contracts as principal and not as representative. In *Clarke v. Bailie*, 45 Can. S.C.R. 50, I called attention to the fact that in the State of Massachusetts (see *Chase v. City of Boston*, 180 Mass. 458) stockbrokers engaged in buying on margins for their clients are deemed to buy on their own account, entering at the same time into an executory agreement to sell to the client on demand at the market price. That seems also the legal effect of transactions on the London Stock Exchange known as "contango" transactions, which constitute, apparently, a very large proportion indeed of the transactions on the Exchange. There is nothing startling or inherently improbable in the idea of a person buying and selling on margin speculation, that is to say, by the aid of the credit of a broker or a commission merchant who lends his credit for a commission, agreeing with the broker or the commission merchant that in the transactions in which he expects to make his profits the commission merchant shall act as principal while at the same time the client or customer shall be entitled to the profit derived from the transaction.

Robinson v. Mollett, L.R. 7 H.L. 802, and cases following it, are the authorities chiefly relied upon. But, the principle of those cases appears to have no application to the circumstances now under consideration. The plaintiff there relied upon an implied term of his employment founded upon a custom of his trade. It was held that a custom which, on being imported, would have the effect of altering the essential character of the employment could not be implied by law. It was not held that the plaintiff must fail if the contract of employment had expressly or by necessary implication provided that the employment was to be subject to a specified custom or the custom of the trade, whatever it might be, or if the circumstances shewed such to be the

intention. Lord Blackburn, p. 810, then Blackburn, J., *Robinson v. Mollett*, L.R. 7 H.L. 802, uses these words:—

“Had the order in the present case expressed that it was to buy according to the custom of the tallow market, there can, I think, be no question that the custom would have been incorporated, and that all that the plaintiffs did would have been in strict conformity with the authority given.”

Lord Blackburn had been in the same case in the Exchequer Chamber, and on the question which presented itself for decision (namely, whether in the absence of any reference to the custom in the written order on which the plaintiff acted, the custom was to be incorporated), he had differed from other very able Judges, including Mr. Justice Willes, and I do not think he would have used the language quoted above if he had supposed they entertained a different opinion upon the point he is there dealing with.

The next question arises on the second branch of the defence, namely, whether these dealings were illegal. Section 231 of Criminal Code, R.S.C. ch. 146, declares:—

“231. Every one is guilty of an indictable offence and liable to five years’ imprisonment, and to a fine of five hundred dollars, who, with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company, or undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise,—

“(a) without the *bonâ fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same as the case may be, makes or signs, or authorizes to be made or signed, any contract or agreement oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares or merchandise; or

“(b) makes or signs, or authorizes to be made or signed, any contract or agreement oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise, in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery.

“2. It is not an offence under this section if the broker of the purchaser receives delivery, on his behalf, of the articles sold, notwithstanding that such broker retains or pledges the

same as security for the advance of the purchase money or any part thereof."

This enactment first appeared in 1888, 51 Vict. ch. 42. The preamble to the Act shews that the Legislature had in view the suppression of "bucket shops." A "bucket shop" has been held to be a place where bets are made as to the rise or fall of commodities under the guise of fictitious sales and purchases. See *Pearson v. Carpenter*, 35 Can. S.C.R. 380, at p. 382. Now, it cannot be contended that the sales and purchases entered into by the respondents for the account of the appellant were fictitious. In each case there was an actual contract. It is quite true that in each of these cases the contract, on being reported to the Clearing House Association and accepted by the manager, became pursuant to the rules of the Association transformed into two contracts in the manner already described, but these two contracts were legally binding contracts which either party could be called upon at the proper time to fulfil and which in the ordinary course would be fulfilled either by the delivery of the commodity sold and the payment of the purchase price actually or by setting off the performance of one contract against the performance of another between the same parties relating to the same commodity deliverable at the same time.

The evidence shews that the Winnipeg Grain Exchange and the Winnipeg Clearing House are not mere conveniences for speculation. All transactions for future delivery, in fact, take place through the Grain Exchange, and the vast majority apparently through the instrumentality of the Clearing House Association. When the commission merchant buys or sells for future delivery on the Exchange and the transaction takes place between two members of the Clearing House Association, the commission merchant enters into a contract which he knows he will be obliged to carry out either by payment or delivery actually or by set-off of payments against the exigible obligations under some other real contract which has been accepted by the manager of the Clearing House Association. I think the following observations of Mr. Justice Holmes in *Board of Trade of Chicago v. Christie Grain and Stock Co.*, 198 U.S.R. 236, at 247, are pertinent:—

"As has appeared, the plaintiff's Chamber of Commerce is, in the first place, a great market, where, through its eighteen

hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market, contracts are not confined to sales for immediate delivery. People will endeavour to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices, and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But Legislatures and Courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such course attempts at a remedy for the waste incident to every social function as a simple prohibitoin and laws to stop its being are harmful and vain. This Court has upheld sales of stock for future delivery and the substitution of parties provided for by the rules of the Chicago Stock Exchange: *Clews v. Jamieson*, 182 U.S.R. 461. When the Chicago Board or Trade was incorporated, we cannot doubt that it was expected to afford a market for future as well as present sales, with the necessary incidents of such a market, and while the State of Illinois allows that charter to stand, we cannot believe that the pits, merely as places where future sales are made, are forbidden by the law. But again, the contracts made in the pits are contracts between the members. We must suppose that from the beginning as now, if a member had a contract with another member to buy a certain amount of wheat at a certain time, and another to sell the same amount at the same time, it would be deemed unnecessary to exchange warehouse receipts. We must suppose that then, as now, a settlement would be made by the payment of differences, after the analogy of a Clearing House. This naturally would take place no less that the contracts were made in good faith for actual delivery, since the result of actual delivery would be to leave the parties just where they were before. Set-off has all the effects of delivery. The ring settlement is simply a more complex case of the same kind. These settlements would be

frequent, as the number of persons buying and selling was comparatively small. The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says. There is no doubt, from the rules of the Board of Trade or the evidence, that the contracts made between the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. Hedging, for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired."

In point of fact, the particular transactions entered into in this case were transactions with milling companies or other exporters, and, as regards the sales, the evidence of the respondents' manager is that in every case the warehouse receipts were actually delivered.

The argument most strongly pressed upon us under this head was that the appellant had no *bond fide* intention of acquiring any commodity or selling any commodity or of making or receiving delivery of any commodity. What I have already said as to the intention of the appellant furnishes, I apprehend, the answer to this argument. The appellant's intention was to "speculate in futures," but to do so by means of sales and purchases of commodities for future delivery by the respondents "in accordance and subject to the rules, regulations and customs of the Winnipeg Grain Exchange." The contracts authorized were to be contracts in accordance with those rules, regulations and customs. As the

authority was in fact executed, the contracts entered into were contracts to which the appellant was not a party. They were not contracts which in any way professed to be purchases or sales by him, or to give him the right to demand delivery, or to insist upon delivery being taken. But they were contracts in every case, as I have already pointed out, which bound the respondents as principals in a contract of sale or purchase to make or receive delivery as the case might be; and there is no support in the evidence—indeed, the evidence is entirely against it—for the proposition that the respondents in entering into these contracts had no intention of acquiring commodities or selling commodities or to make or receive delivery.

ANGLIN, J.:—The facts of this case are fully stated in the judgment of the learned Chief Justice of Manitoba.

The plaintiffs sue to recover moneys expended by them in alleged discharge of their employment as brokers of the defendant. It is essential to their right to recover that they should prove that this expenditure was incurred in carrying out the commission entrusted to them. Either failure on their part to establish that, or proof that the undertaking was itself illegal, is fatal to their right to recover.

Their commission was to procure persons to enter into binding contracts to buy grain from the defendant. It is admitted that, although they made contracts with other brokers for the sale of grain in the quantities stipulated, these contracts were all subject to the rules of the Clearing House Association—an adjunct of the Winnipeg Grain Exchange. It is conclusively established by the evidence that, as the result of what the plaintiffs did in professed fulfilment of the defendant's commission, he did not, and it was intended that he should not, obtain any contract whereby any other person became and remained bound to him as a purchaser of the grain which he instructed the plaintiffs to sell on his account. By the system of the Clearing House his purchasers and their brokers were discharged, on the respective days on which the several contracts were made, from any obligations under them to accept delivery from, and make payment to, the defendant. That obligation was assumed by the Clearing House and was in turn set off by it against other obligations of the plaintiffs to the

Clearing House. The adjustment of accounts between the plaintiffs and the Clearing House would afford a complete answer to any claim which the defendant might attempt to prefer against the Clearing House. In fact, as the net result of what occurred, the personal responsibility and solvency of the plaintiffs was the only security which the defendant had that, at the maturity of the contract he had employed them to make for him, purchasers would be available to take his grain and pay him the sale prices. Nobody else was under any contractual obligation to do so. Such an outcome is something so radically and essentially different from what is contemplated by the instructions ordinarily given to a broker to buy or sell stocks or commodities that it could be taken to be a performance of the broker's undertaking only upon the clearest proof that the principal knew of the rules which operated to produce it, and therefore contemplated the adoption of this method of carrying out his mandate. That the evidence does not establish. The present case, in my opinion, falls within the principle of the authorities cited and relied upon by the learned Chief Justice of Manitoba, in whose conclusions on this branch of the appeal I respectfully concur.

While I do not rest my judgment on the ground of illegality, because in the view I take on the other question it becomes unnecessary that I should do so, I incline to think the evidence discloses that neither the plaintiffs nor the defendant at any time contemplated that delivery of the grain sold should be made or taken under the agreements purporting to be contracts for the sale of such grain which the defendant authorized and the plaintiffs made. The intent always was to meet the obligation to deliver by an off-set of a contract to purchase a like quantity of grain—to adjust the differences between the selling and the buying prices and by thus dealing in such differences to make gain or profit by an anticipated fall in the price of the merchandise. Such transactions are within the literal terms of sec. 231 of the Criminal Code, and, I believe, are also within the mischief against which it was directed. The difference in morals between thus dealing in differences and speculative transactions in which there is an actual purchase accompanied by present or future receipt and a subsequent sale accompanied by delivery, the intent being to make profit by the rise in price of the commodity so dealt in, may not

be very clear; but Parliament in its wisdom has deemed it proper to make this distinction, with the result that a transaction of the former class is, while one of the latter is not, *malum prohibitum*.

For these reasons I would allow this appeal and would dismiss the plaintiff's action.

BRODEUR, J.:—I concur in the opinion of my brother Idington.

Appeal allowed with costs.

[SUPREME COURT OF CANADA.]

BEFORE SIR CHARLES FITZPATRICK, IDINGTON, DUFF, ANGLIN, AND
BRODEUR, JJ.

MINCHIN v. THE KING.

1. THEFT (§ I—15)—EMBEZZLEMENT—VARIOUS DEFALCATIONS AS ONE CONTINUOUS ACT.

A conviction for theft of an entire sum, although it may have been taken in numerous small amounts at different times during the deficiency period, may be supported without proving the taking of each or any of such several amounts and the case treated as one continuous act of theft although there were a number of distinct takings, if a deficiency had occurred equal to the amount by which the accused had falsified an entry in his employer's books at or about the date at which he is charged with having embezzled the sum, if the evidence adduced also warrants the inference that the money stolen had reached his hands and had been misappropriated by him.

[*R. v. Minchin*, 22 Can. Cr. Cas. 254, 7 A.L.R. 148, 15 D.L.R. 792. affirmed; *R. v. Henwood*, 11 Cox. C.C. 526, 22 L.T.R. 486, referred to.]

2. EVIDENCE (§ XI T—885)—CRIMINAL MATTERS—RELEVANCY — EVIDENCE DISCLOSING A COLLATERAL CRIME TO THAT CHARGED.

Where evidence of falsification of books of account is directly relevant to the question at issue on a trial for theft, as where money had been misappropriated by an employee and the books falsified by an entry made by him to cover the deficiency in the employer's books, the falsification of the books although a crime in itself is none the less admissible on a charge of theft laid as for one offence of the aggregate sum misappropriated during a defined period although it may have been taken in numerous small amounts at different times during that period.

[*R. v. Minchin*, 22 Can. Cr. Cas. 254, 7 A.L.R. 148, 15 D.L.R. 792. affirmed.]

3. EVIDENCE (§ IV J—455)—CRIMINAL TRIAL—DEFENDANT'S BANK ACCOUNT —RELEVANCY ON CHARGE OF THEFT OF MONEY.

On a charge of theft in respect of the amount alleged to have been embezzled from the city's funds by a city employee it is admissible for the Crown to put in evidence the defendant's bank account shewing

that about the time of the defalcation as disclosed by the audits, a deposit was credited to him by the bank of a like amount to that embezzled, but where any suggestion based on the bank deposit was met by shewing that the money was a loan procured by a discount at another bank of his own and his wife's note, there is no "substantial wrong or miscarriage" (Cr. Code sec. 1019) to entitle the accused to a new trial or to set aside the conviction, if the Judge directed the jury that none of the deposits were shewn to have come from the city funds, and no unfair or improper use prejudicial to the accused had been made of the bank account.

[*R. v. Minchin*, 22 Can. Cr. Cas. 254, 7 A.L.R. 148, 15 D.L.R. 792, affirmed.]

4. APPEAL (§ II A—35)—TO SUPREME COURT (CAN.)—(CRIMINAL CASE WHERE DISSENT IN COURT BELOW.

While the jurisdiction of the Supreme Court of Canada on a criminal appeal may be limited to the points on which there was a dissent in the court appealed from, a reasonable latitude should be permitted to counsel on the argument of the appeal to go fully into the whole conduct of the trial for the purpose of elucidating the appealable ground and the limitations imposed by Cr. Code sec. 1019 on the appellate jurisdiction to interfere unless there has been a substantial wrong or miscarriage at the trial or an improper disallowance of a challenge. (*Per Idington, J.*)

[*Eberts v. The King*, 20 Can. Cr. Cas. 273, 47 Can. S.C.R. 1, referred to.]

R. B. Bennett, K.C., for the prisoner.

James Short, K.C., and *L. F. Clarry, K.C.*, for the Crown.

DECIDED: March 23, 1914.

APPEAL from the judgment of the Supreme Court of Alberta from which BECK, J., dissented on a Crown case reserved upon which the conviction was affirmed. (*R. v. Minchin*, (1914), 22 Can. Cr. Cas. 254, 7 A.L.R. 148, 15 D.L.R. 792.)

This appeal was dismissed.

FITZPATRICK, C.J.:—I would dismiss this appeal.

IDINGTON, J.:—The appellant is a prisoner convicted of having stolen \$5,000 from the City of Calgary whilst acting as assistant treasurer of the city.

The appeal comes before us by way of appeal upon a case reserved for the decision of the Appellate Court of Alberta.

One of the learned Judges of that Court dissented from the conclusion reached by that Court to dismiss the appeal. He dissented upon the ground that the prisoner's bank-book should

not have been admitted in evidence, or, after its admission, that, the prisoner's counsel having elicited from the bank's officers, and the prisoner in giving evidence relative to an item of the deposit by the prisoner of \$5,000, an explanation which shewed, if accepted, that the said item could have no connection with the sum alleged to have been stolen, and no explanation having been insisted upon by the Crown officer during the trial relative to the remaining items of deposit in the bank-book, it ought not to have been used further as evidence against the prisoner; especially in view of a circumstance which took place in the course of the bank officer's examination by the prisoner's counsel. The circumstance so relied upon was that having elicited the explanation in question, prisoner's counsel had dropped the remark, as follows:—"This is the only item, I take it, in this sheet that we are interested in at all." There is nothing in the case to indicate that this remark was addressed to the Court, or so as to call the attention of the Crown officer or the Court to the purpose of insisting that, unless an intimation to the contrary came from the Court or Crown officer, both would be expected to be bound by such excuse and to treat the remaining part of the account as if not in evidence. No further examination took place relative to the rest of prisoner's bank account then in evidence.

The learned trial Judge, during his charge to the jury, adverted to this bank account and pointed out that the item of \$5,000 had been satisfactorily explained. He then proceeded to tell the jury that, excluding the \$5,000 item and items of discount, there remained on the deposit side of the account, extending over a period of five months and a half, items which in the aggregate formed a total sum of \$3,297.57, and if the prisoner's salary during the time over which the account extended was deducted, the balance would only be the sum of \$2,239.57.

He then pointed out to the jury that there was no evidence of that having any relation to the inquiry. He used the following language in dismissing that subject from his further consideration:—

It is suggested to you by the Crown that these apparently large deposits afford some evidence of the fact that Minchin was getting money elsewhere than from his salary and, of course, that is so.

He did not get all this money from his salary. We have no explanation of any of these items except the five thousand dollars. We have no evidence to shew that any of these deposits which form the total that I have given you came from the city. We have the bald fact, unexplained, and therefore not to be dealt with in the light of evidence, that this considerable sum was deposited to his credit in the bank between these dates.

He had previously, in emphatic language, told the jury that the question of who made the alteration in the books and documents was the turning point of the case, and spoke as follows:—

Then the Crown goes further and claims that the alterations made in the voucher for this sum, exhibit 4, the alteration in the petty cash-book, and the general cash-book, were made by Minchin, and, to my mind, that is the turning point in the case. In my judgment, at any rate, of course you gentlemen may think differently, the hand that made those alterations was the hand of the man that stole the money. The alterations were undoubtedly made either for the purpose of concealing a crime, or of making possible the commission of one, and no person but he who contemplated the crime or had committed it, would have the slightest interest in making these alterations, so that, if you can see from all the evidence that has been given that these alterations were made by Minchin, in my judgment at any rate, you have gone a very long distance towards establishing his guilt for the crime with which the Crown charges him. This fact has been appreciated by counsel for the Crown, as well as by counsel for the prisoner, and a great deal of time and attention has been devoted, and very properly too, to the question of these alterations.

I cannot conceive how the bank-book could have been excluded from being put in evidence. Indeed, the Crown officer would have failed to discharge his duty had he omitted to investigate the prisoner's bank account and to endeavour to shew therefrom some trace of the stolen money.

And if it had come to his knowledge that there had been a deposit of \$5,000, the exact amount in question, his omission to produce it might have led to disagreeable reflections. I, therefore, see no ground of complaint in the admission of the bank-book. I can conceive of a Crown officer making the mistake of using unfairly the results of such an investigation, but we have no evidence of such having transpired in this case.

I can hardly imagine any counsel for prisoner, if there had

been such unfair use of the evidence in question, sitting in silence and not using his privilege and discharging his duty to his client by proper objection, and remonstrance if persisted in. We have nothing of the kind in this case, and the only fair conclusion is that nothing improper or unfair took place. Nay, more. We have the learned trial Judge's charge in full and no indication therein that improper use had been made of the evidence. And his charge certainly makes it clear that there was no evidence of what these items might rest upon or whence the money came. There is no intimation that the prisoner was to explain or that his failure to explain furnished any evidence against him.

It could, I respectfully submit, only be in such case that the reasons assigned by the learned Judge in the support of his dissenting opinion could have any force.

The case he relies upon does not carry the law further. The bare fact that the prisoner had money in the bank during the period in question, in itself was quite admissible, just as much as if he had put it in his pocket, but it would carry no substantial weight with the jury unless connected in some way with the abstraction of money alleged to have been stolen.

Such, I take it, is all that can fairly be said of the charge in this regard. There was no objection made to it, which I certainly think would have been made had the remarks of the learned trial Judge been felt by counsel to have borne unfairly on his client.

Indeed, to my mind, it was obviously impossible for a prudent Crown officer to have relied upon such an account in way of putting any stress thereupon. His doing so, or even without his doing so, the situation was such as to have enabled prisoner's counsel to have suggested with most telling effect the fact that the Crown had been driven to investigate the bank account of a man previously of good character and presumably innocent, and had utterly failed to find the half of \$5,000.

It was the theft of \$5,000, and nothing more or less, that was being investigated. The whole burden of the proof to support the charge rested upon the prisoner's having made the

alterations in the cash-book and other books and documents, which demonstrated the case for the Crown. Without that there was no case and no possible chance of the prisoner's conviction. I venture to think that everyone engaged for days in the trial must have been deeply impressed with this view of what they were about. If the jury had found the evidence given for the Crown on that feature of the case to be reliable, it was, under the very remarkable circumstances of quite undisputed facts, as complete and crushing as one can conceive of.

As is so well pointed out by the learned trial Judge in his charge, which I may say was eminently fair, it is not conceivable that anyone else who alone or in conjunction with others by any possibility could have stolen the money should have thought of making these alterations, much less of simulating the handwriting of the prisoner.

Our jurisdiction may, as I have intimated in the case of *Eberts v. The King*, 47 Can. S.C.R. 1, 20 Can. Cr. Cas. 273, be confined to the ground taken by a dissenting Judge or minority in the Appellate Court hearing an appeal on a reserved case.

We have never acted upon this, but have given every reasonable latitude to the counsel for a man convicted to go fully into all that he conceives is possible ground of complaint. It enables the ground taken, if properly so confined, to be illuminated by the whole conduct of the trial.

It is at least fair, and, perhaps, essentially necessary in many cases, to adopt that course in order that we may correctly appreciate and apply sec. 1019 of the Criminal Code, which limits our jurisdiction to set aside a conviction, by enacting, as follows:—

“1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial,” save in regard to improper disallowance of any challenge.

There was no substantial wrong or miscarriage occasioned

on this trial by anything now complained of. There was no conviction sought or got by merely comparing the balance at one end of the account with that at the other demonstrating a deficiency. There was no conviction of one offence upon or by evidence which, in truth and substance, constituted another offence.

There was a conviction got by tracing the conduct of the accused in his endeavour to hide or escape from the detection of his crime as alleged. In his devious path for that purpose, including his evidence in denial of his alteration of the books and documents, he may have committed other crimes which, possibly, in the minds of the jurors were given that weight they were entitled to attach to such circumstances on their view of the case against him.

I see no reason for disturbing the verdict or setting aside the conviction and, therefore, think the appeal must be dismissed.

DUFF, J., agreed that the appeal should be dismissed.

ANGLIN, J.:—There was abundant evidence upon which the jury might find the accused guilty of the offence charged against him. But for the falsification of a debit entry to the extent of \$5,000, the books of the municipal corporation, including one in which the entries were made by the defendant personally, would have shewn that there should have been \$5,000 more money in the hands of the municipal treasurer in November, 1911, than he actually had. A balancing of the cash in hand with the amount shewn by the books, which took place in the month of June, when the defendant was leaving for a holiday, and again in the month of November, when he resigned his office, made it abundantly clear that the defalcation had taken place in the interval, the alterations in the books and in a voucher having been made before the latter date. The evidence established that the moneys taken in by the assistants of the accused were, each evening, accounted for and handed over to him. Although the method in which this was done was certainly loose, there was sufficient to

justify a conclusion by the jury that the moneys which were taken had come to the hands of the accused. When it was established to their satisfaction that the falsification of the books, which was obviously done for the purpose of concealing the defalcation which had taken place, was the act of the accused, they had evidence of almost irresistible cogency that he had committed the defalcation.

Evidence that during a defined period of less than six months a deficiency had occurred equal to the amount by which the accused had falsified an entry in his employer's books at or about the date at which he is charged with having embezzled this sum, accompanied, as it was, by evidence warranting the inference that the money stolen had reached his hands and had been misappropriated by him, suffices to sustain a conviction for theft of the entire sum (although it may have been taken in numerous small amounts at different times during the period covered by the evidence) without proving the taking of each or any of such several amounts. The case may be treated as one continuous act of theft, although there were a number of distinct takings: *Regina v. Henwood* (1870), 22 L.T.R. 486, 11 Cox C.C. 526; *Rex v. Bleasdale*, 2 Car. & K. 765; *Regina v. Slack*, L.R. 7 Q.B. 408; *Regina v. Balls*, L.R. 1 C.C.R. 328, 40 L.J.M.C. 148.

Much attention was devoted by counsel for the appellant to the circumstance that falsification of books of account is in itself a crime, and he very strongly contended that evidence of one crime is not admissible to establish that the accused has committed another. Where evidence of certain facts is directly relevant to the issue joined, the circumstance that such facts incidentally shew that the accused has been guilty of another crime cannot render such evidence inadmissible. Moreover, I do not find any question of the admissibility of this evidence reserved in the case stated.

Another objection taken on behalf of the appellant caused me some misgiving. In the course of the Crown case a part of the prisoner's bank account was put in evidence. The admission of this evidence was not objected to. It could not

have been excluded for two reasons: first, because it shewed a deposit to the defendant's credit of a sum of \$5,000 about the time when the defalcation was charged; and secondly, because it might have been followed by evidence shewing that the defendant had no other legitimate source of revenue except his salary, and he would have then been called upon to explain any excess in his monthly deposits over the amount of his salary. Upon his failure to offer such an explanation under these circumstances, the deposits unaccounted for would be evidence against the accused which a jury might very properly consider.

But the deposit of \$5,000 was shewn to represent moneys which came into the hands of the defendant from an entirely independent source; and the Crown did not adduce any evidence to shew that he had no other source of income or revenue beyond his salary, the amount of which was proved, from which other deposits in his bank account, in excess of his salary, might have come. From what transpired at the trial, it would seem reasonably clear that counsel for the accused proceeded on the assumption that the bank account was put in solely to shew the \$5,000 deposit. In cross-examination of the Molson's Bank accountant, who produced the bank account, it was shewn that the \$5,000 deposit on October 3rd was a loan which the accused had procured from the Union Bank by discounting the note of his wife and himself. In the course of his examination of this witness, counsel for the accused made this observation, which in the shorthand notes appears in the form of a question: "This is the only item, I take it, in this sheet that we are interested in at all?" to which no reply was made.

When the accused was called as a witness, he gave a similar explanation of the \$5,000 deposit, and neither in chief nor in cross-examination was his attention drawn to any other item in the account. Indeed, no further attention appears to have been paid to this bank account until some reference was made to it by counsel for the Crown in addressing the jury and by the learned trial Judge in his charge. After telling the jury that they would have the defendant's bank account before them,

the learned Judge proceeded to state that the \$5,000 item had been fully cleared up. He then called their attention to the amount of the accused's salary and informed them that, in addition to the \$5,000 item and his salary deposits, the account shewed that there had been placed to his credit during the six months' period in question a sum of \$2,239.57, and he significantly added:—

It is suggested to you by the Crown that these apparently large deposits offer some evidence of the fact that Minchin was getting money elsewhere than from his salary, and, of course, that is so. He did not get all this money from his salary. We have no explanation of any of those items except the \$5,000.

Had nothing more been said, I incline to think that I should have felt obliged to conclude that an unfair and improper use prejudicial to the accused had been made of his bank account. In the absence of evidence that he had no other source of income or revenue than his salary, the deposits in his bank account were entirely irrelevant to the issue and afforded no evidence whatever which a jury should consider in determining his guilt or innocence. But the trial Judge continued:—

We have no evidence to shew that any of these deposits, which form the total that I have given you, came from the city. We have the bald fact, unexplained, and therefore not to be dealt with in the light of evidence, that this considerable sum was deposited in the bank between these dates.

These observations concluded the learned Judge's reference to the bank account. While the charge would, no doubt, have been very much more satisfactory had the learned Judge distinctly told the jury that, without evidence that the defendant had not means or sources of income other than his salary, his bank account was not relevant evidence—that no inference could properly be drawn from it that he had taken any moneys belonging to the city—that it afforded no corroboration of the Crown case—and that, for these reasons, they should not take it into consideration at all, I rather think that this was what the learned Judge intended to convey by the sentence: "We have no evidence to shew that any of these deposits, which formed the total that I have given you, came from the city."

Assuming the jury to have been composed of men of fair intelligence, it is unlikely that they were affected adversely to the accused by the evidence of the amount of deposits in his bank account. At all events, in view of the saving sentence which I have quoted, I find myself unable to say that "something not according to law was done at the trial, or some misdirection given" whereby "some substantial wrong or miscarriage was occasioned, on the trial," and I am, therefore, unable to reach the conclusion that the conviction should be set aside or a new trial directed. Criminal Code, sec. 1019.

BRODEUR, J.:—I am of opinion that this appeal should be dismissed for the reasons given by my brother Anglin.

Appeal dismissed.

[SUPREME COURT OF NOVA SCOTIA.]

REX v. BURGESS.

BEFORE SIR CHARLES TOWNSEND, C.J., GRAHAM, E.J.,
AND RUSSELL, LONGLEY AND DRYSDALE, JJ.

1. CRIMINAL LAW (§ II D—56)—CRIMINAL INFORMATION FOR LIBEL—APPLICATION FOR LEAVE TO FILE.

Leave to file a criminal information for libel can only be granted by the Full Court in Nova Scotia, *i.e.*, the provincial Supreme Court, sitting *en banc*; a single Judge, although presiding over a Court for the disposal of criminal business in a county, has no jurisdiction to grant the leave.

[*R. v. Beale*, 1 Can. Cr. Cas. 235, 11 Man. L.R. 448, and *R. v. Labouchere*, 12 Q.B.D. 320, 15 Cox C.C. 415, referred to.]

DECIDED: January 2, 1915.

DEMURRER upon a criminal information for libel. An application had been made to Drysdale, J., sitting as a Court for the disposal of criminal business at Sydney in the County of Cape Breton, for leave to exhibit a criminal information against the defendant for the publication in a paper known as the "Canadian Commonwealth" of a criminal libel reflecting upon a society or large body of the public known as the Knights of Columbus. The

prosecutor was Charles Lorway, Esq., Clerk of the Crown at Sydney, and the libel complained of was the publication by defendant in said "Canadian Commonwealth" of the words of an oath alleged to be taken by members of the society, fourth degree.

The learned Judge having granted the application, defendant demurred on the ground that the information and the matters therein contained were not sufficient in law to compel him to answer thereto. Subsequently, on hearing counsel, it was ordered that the record and all proceedings herein be transmitted to the Clerk of the Crown at Halifax for the purpose of argument of said demurrer before the Supreme Court *en banc*.

The following questions were also referred for decision to said Supreme Court *en banc*:—

1. Upon said record was the informant justified in law in giving notice of trial of said information for the sittings of said Court at Sydney?

2. If the giving of said notice of trial was not justified should the defendant have costs of attendance pursuant to said notice?

H. Mellish, K.C., in support of demurrer.

W. F. O'Connor, K.C., and *A. D. Gunn*, K.C., *contra*.

The judgment of the majority of the Court was delivered by

GRAHAM, E.J.:—There has been published, and it is alleged that the defendant published it, a very serious libel upon a society known as the Knights of Columbus. The publication consists of an oath required as it is alleged to be taken by the members of that society, a secret society, which alleged oath no doubt is grossly a fiction. And the applicant has applied for leave to exhibit a criminal information. He did not avail himself of the ordinary remedy, for a criminal libel before a magistrate and the grand jury, but has sought to avail himself of this extraordinary remedy. He did not apply to the Full Court in Halifax, but applied on circuit to one of the learned Judges of this Court, "sitting as a Court for the trial of criminal cases" at Sydney. The application was granted by the learned Judge, and an information was filed in the office of the prothonotary and Clerk of the Crown at Sydney in the following terms:—

“Record of Information.

“Pleas before our lord the King. In the Supreme Court of Nova Scotia, Crown Side, of His Majesty’s Supreme Court of Nova Scotia, at the sittings of the Supreme Court, Crown Side, at Sydney in the county of Cape Breton, in the year of our Lord 1914.

“Cape Breton County, Sydney.

“Be it remembered that Charles Lorway, Esq., Clerk of the Crown at Sydney in the county of Cape Breton, province of Nova Scotia, of His Majesty’s Supreme Court, Crown Side, for the county of Cape Breton, province of Nova Scotia, before the King himself, who for our said lord the King in this behalf prosecutes in his proper person, came here into the Supreme Court, Crown Side, of His Majesty’s Supreme Court, before the King himself, at the Supreme Court, Crown Side, at Sydney in the county of Cape Breton, province of Nova Scotia, on the 25th day of February, A.D. 1914. And for our said lord the King brought into the said court before the King himself a certain information against Edwin H. Burgess, which said information follows in these words, that is to say:—

““In the Supreme Court, Crown Side, Cape Breton County, to wit:

““Be it remembered that Charles Lorway, Esq., Clerk of the Crown at Sydney, in the county of Cape Breton, province of Nova Scotia, of His Majesty’s Supreme Court, Crown Side, for the County of Cape Breton, province of Nova Scotia, before the King himself, who for our said lord the King in his behalf prosecutes in his own proper person comes here into this Court before the King himself, on the 25th day of February, A.D. 1914, in His Majesty’s Supreme Court, Crown Side, at Sydney, in the county of Cape Breton. And for our said lord the King gives the Court here to understand and be informed that Edwin H. Burgess did publish without legal justification or excuse a defamatory libel on or about the 3rd day of January, A.D. 1914, at Baddeck, in the county of Victoria, in a paper called the “Canadian Commonwealth,” bearing date January 3rd, 1914, a paper purporting to be printed at Baddeck in the county of Victoria, and with a general circulation throughout the counties of Victoria and

Cape Breton and elsewhere in the province of Nova Scotia, of and concerning the Knights of Columbus, a fraternal society or organization consisting of many members residing in the county of Cape Breton and elsewhere throughout the province of Nova Scotia, and said fraternal society or organization exists in Cape Breton county and elsewhere in the province of Nova Scotia, contrary to the statute in such cases made and provided, the said defamatory libel being contained in the following article which was printed in the said Canadian Commonwelath of Januray 3rd, 1914, the said article tending to excite the hatred of the people against all persons belonging to the Order of the Knights of Columbus and conduces to a breach of the peace.

“‘Knights of Columbus’ oath, fourth degree: (Here follows the alleged oath.)’”

There has been a demurrer filed on the part of the defendant and several grounds for quashing the information thereon have been urged before us.

In my opinion the learned Judge had not power to grant the application. It should have been made to the Full Court at Halifax. It is quite obvious that the practice in England was for such an application to be made to the Court of King’s Bench, sitting at Westminster.

By the statute 4 & 5 Wm. & M. ch. 18, it is provided:—

“Whereas divers malicious persons have more of late than in times past procured to be exhibited and prosecuted informations in their Majesties’ Court of King’s Bench at Westminster against persons in all the counties of England, &c., that after 1693 the Clerk of the Crown in the said Court of Kings’ Bench for the time being shall not without express order to be given by the said Court, ‘exhibit, receive or file any information for any of the causes aforesaid or issue out any process thereupon before he shall have taken recognizance,’ &c., &c.”

And by sec. 6, that nothing in this Act shall extend to any other information than such as are or shall be exhibited in the name of their Majesties’ coroner or attorney in the Court of King’s Bench for the time being, commonly called the Master of the Crown Office, anything, &c.

The jurisdiction of the Supreme Court of Nova Scotia was

conferred by statute, and what was conferred was the jurisdiction of the Courts of King's Bench, Common Pleas and Exchequer in England: Provincial Laws, 1774, ch. 6, p. 183. I refer also to R.S. (Third Series), ch. 23, sec. 1, passed before Confederation. By the Acts of 1758, ch. 13, sec. 36, Provincial Laws, p. 20,

"All indictments, process pleadings and trials and the rules of evidence upon any trials for any felonies or misdemeanours either by the common law of England or by virtue of this Act shall be according to the usage, practice and laws of England." Sec. 25 of R.S.N.S. 1900, ch. 155:—

"Every action and proceeding in the Supreme Court and all business arising out of the same except as hereinafter provided, shall so far as is practicable and convenient, be heard, determined and disposed of before a single Judge

"(2) A Judge sitting elsewhere than in the Supreme Court *in banco* shall decide all questions coming properly before him, but may reserve any case, or any point in any case, for the consideration of the Supreme Court *in banco*.

"(3) In all such cases any Judge sitting in Court shall be deemed to constitute a Court."

Before passing from that provision it must be remembered that the former Equity Court was by the Judicature Act fused with the Supreme Court and provision had to be made for that. And for the trial of actions other than equitable actions provision was thus made for the trial of those by a single Judge sitting as a Court.

In respect to trials, under "Sittings at Halifax," it was provided, sec. 26:—

"There shall be two regular sittings of the Court in Halifax in each year for the trial of civil causes, one to commence," &c. (fixing the times).

"Sec. 27: There shall be two sittings of the Court for the disposal of criminal cases," &c.

"Sec. 28: There shall be as heretofore five circuits in the province," &c.

Under the spring and autumn circuits, in the Judicature Act, R.S.N.S. 1900, ch. 155, sec. 29, there is this provision:—

"The Supreme Court shall sit in the several counties twice a year for the trial of causes and issues, whether they are legal

or equitable, and whether they are to be heard and determined with or without a jury, as follows," &c.

As to the Cape Breton circuits, there have been changes in the dates of the sittings by the Acts of 1903, ch. 56, and of 1903-4 ch. 16.

After dealing with civil cases, sec. 3 of the latter Act provides:

"At Sydney there shall also be three regular sittings of the Court in each year for the trial or disposal of criminal causes—one beginning on," &c., &c.

Of course by the B.N.A. Act the criminal law and procedure in criminal matters is assigned to the Parliament of Canada, while the province may constitute the courts of criminal jurisdiction.

By the Criminal Code of Canada, sec. 2, sub-sec. 35: "Superior Court of criminal jurisdiction" "means and includes . . . in the province of Nova Scotia the Supreme Court."

Coming to Jurisdiction, Part XI., sec. 577, it is provided as follows:—

Sec. 577: "Unless otherwise specially provided in this Act, every Court of criminal jurisdiction in any province is competent to try any crime or offence within the jurisdiction of such Court to try wherever committed within the province if the accused is found or apprehended or is in custody within the jurisdiction of such Court, or if he has been committed for trial to such Court or ordered to be tried before such Court," &c.

Section 580 provides:—

"Every superior Court of criminal jurisdiction and every Judge of such Court sitting as a Court for the trial of criminal causes and every Court of Oyer and Terminer and general gaol delivery has power to try any indictable offence."

This brings me to the Crown Rules.

By sec. 576 of the Criminal Code,

"Every superior Court of criminal jurisdiction may at any time with the concurrence of a majority, make rules of Court not inconsistent with any statute of Canada which shall apply to all proceedings relating to any prosecution proceeding or action instituted in relation to any matter of a criminal

nature or resulting from or incidental to any such matter and in particular,—

“(a) For regulating the sittings of the Court or of any division thereof, or of any Judge of the Court sitting in Chambers except in so far as the same are already regulated by law.

“(b) For regulating in criminal matters the pleading practice and procedure in the Court including the subjects,” &c.

The Judges of this Court made Crown Rules first in 1889, but these will be found in the Crown Rules in an appendix to the Nova Scotia Judicature Act and Rules, 1900. They do not deal with the sittings of the Court or Judges.

Rule 2 provides as follows:—

“No order or rule annulled by any former order shall be revived . . . and where no other provision is made by these rules the present procedure and practice remain in force.”

Under “Custody of Records,” there is Rule 3:—

“The Clerk of the Crown in each county shall have the care and custody of the records and other proceedings on the Crown Side in that county.”

Then Rule 41:—

“With the exception of *ex officio* informations filed by the Attorney-General on behalf of the Crown, no criminal information or information in the nature of a *quo warranto* shall be exhibited, received or filed without express order by the Court, nor shall any process,” &c.

Rule 43:—

“The application for a criminal information shall be made to the Supreme Court by a motion after ten days’ notice thereof in writing and within a reasonable time after the offence complained of,” &c.

Referring to all of this legislation it is quite clear that the practice in England had been to make the application for leave to file a criminal information of this nature to the King’s Bench, not to a single Judge, up to the time their Crown Rules were passed, and that power was continued (I admit expressly) by the Crown Rules to be exercised by “the King’s Bench Division,” a Divisional Court of the High Court of Justice, but never by a

single Judge. And down to the time of the Nova Scotia Crown Rules the jurisdiction and practice in England was by statute adopted and followed.

No one attempted to cite a case in which a single Judge, whether sitting as a Criminal Court or in Chambers, ever granted such leave. And applications have been made to the Full Court.

In *King on Criminal Libel*, p. 205, there is this passage:—

“The procedure for obtaining a criminal information for libel is by a motion for a rule *nisi* before the Full Court—in Ontario, the Divisional Court—on affidavit by and on behalf of the complainant who is called the relator.”

The 25th section of the Nova Scotia Judicature Act which I have cited would be *ultra vires* if an attempt was thereby made to change the criminal procedure of the Court and to enable a single Judge sitting as a criminal Court to dispose of a matter which the criminal law required the Full Court to dispose of: *The Queen v. Beale*, 1 Can. Cr. Cas. 235, 11 Man. L.R. 448, citing decisions of the Ontario Court of Appeal. It is dealing with civil cases chiefly.

Of course a Judge may sit in Chambers anywhere to dispose of a matter, and he may sit in an equitable matter as a Court anywhere, but the provisions as to circuits contemplates trials, not such a matter as this.

Then the sections of the Criminal Code, 577, 580, contemplate trials by a single Judge sitting as a Court. Of course a Judge in Chambers may by express legislation do many things. But in respect to such an application as this I can find nothing in the criminal law which altered in the province the existing practice or conferred power on a Judge sitting as a Court as he does on circuit power to grant a criminal information.

Then, coming to the Crown Rules again, unless another provision is made in these rules the present procedure and practice remain in force. Do rules 41 and 43, by using the expression “Court” and “Supreme Court,” change the procedure and practice then existing and enable a Judge sitting as a Court on the circuit now to do what only the Full Court at Halifax could formerly do? They contain a very apt expression to designate the Full Court.

The Judges had no authority to make rules “inconsistent with

any statute of Canada," including, I should say, any pre-confederation statute passed by the province bearing on criminal procedure still in force. And they could only make regulations respecting the sitting of the Court "except in so far as the same are already regulated by law."

Dealing with the proper construction of the rules there are many places where this expression is found—"Court or a Judge." Take *certiorari*, rules 27-37. The application for a writ of *certiorari* shall be to the "Court or a Judge," and we find that expression in those rules throughout. The same in an application for a writ of *habeas corpus*: Rule 147.

Then "mandamus," Crown Rules 54-69. The application is to be "made to the Court after ten days' notice of the motion, and in the vacation to a Judge in Chambers for a summons to shew cause."

Then Rule 71:—

"An application for a writ of prohibition on the Crown Side shall be made to the Court after two days' notice of motion in all criminal causes or matters;" (and in civil proceedings on the Crown side) "a motion is to be made to the Court or by summons before a Judge at Chambers."

In these cases just mentioned surely "Court" means the Full Court. We have always given it that construction. I think it also means Full Court in respect to the granting of an information in the nature of a *quo warranto* when it was not intended to give a Judge in Chambers jurisdiction and the expression Court or Judge is not used at all.

If that is so, then in the two rules we are considering, 41 and 43, "Court" or "Supreme Court" would mean the Full Court.

I see no good reason for our Judges changing the practice and I do not believe they intended to do so. It would be the last thing they would think of doing, giving a single Judge, sitting as a Court, power to do what in England and Ontario required a Divisional Court and in other provinces the Full Court. And if the intention had been to give the power to a single Judge, why not use the usual expression "the Court or a Judge"? It is so much more convenient to hear such a matter in Chambers than when trying causes.

I think, too, it is inexpedient that a single Judge should have the power. In England where the Court alone has the power there has still been great diversity of conclusion as the cases reviewed in *Reg. v. Labouchere*, 15 Cox C.C. 415, 12 Q.B.D. 320, shew. It will be much worse in Nova Scotia if this power is given to single Judges, resulting, of course, in unreported decisions. It will be noticed that this information is exhibited in the name of Mr. Lorway, the Clerk of the Crown at Sydney, for the county of Cape Breton. This results from obtaining leave at Sydney. He, in this information, prosecutes as the Attorney-General does on the *ex officio* information. In England the King's coroner and attorney, commonly called the Master of the Crown Office, discharges this duty.

When our Legislature introduced the English jurisdiction and practice generally the corresponding officer would, I suppose, be the Clerk of the Crown at Halifax, *cy pres*. Now, while we have eighteen Clerks of the Crown in Nova Scotia, one for each county, to have the care and custody of the records, I think it is excessive to have eighteen King's Coroners or Masters of the Crown Office in a small place like Nova Scotia when they are so economical in England in this matter.

In my opinion the leave to file a criminal information for libel cannot be granted by a single Judge even sitting as a Court. Therefore there must be judgment for the defendant on the demurrer with costs, to be paid by the prosecutor.

DRYSDALE, J.:—This is a case in which while sitting as a Court for the disposal of criminal cases at Sydney I allowed a criminal information to be exhibited against the defendant for the publication of an atrocious libel upon a society or large body of the public known as the Knights of Columbus.

The question whether a Judge sitting in a county for the disposal of the criminal business of the Court has jurisdiction to hear such an application was not argued before me, and the question whether such an application can only be allowed by the Full Court was not considered. Counsel, as well as myself, assumed the Court had jurisdiction and that the Crown Rules providing procedure respecting criminal informations applied to the Court whilst in session at Sydney.

The power of a Judge sitting in a county as a Court for the disposal of criminal business to hear and allow such an application as was granted in this case has been raised by demurrer to the information exhibited and the question with others fully argued. Whilst I am not satisfied that the Court sitting for the disposal of criminal business in a county is without jurisdiction, I agree that the best practice is to require that such extraordinary applications should be made to the Full Court, and I agree that as a matter of good practice all such applications should be referred to the Court *en banc*.

I thought at the time the libel was an atrocious one affecting a large body of the public, and that a case for a criminal information was made within the modern rule so fully considered and established in the case of *The Queen v. Labouchere*, 12 Q.B.D. 320. For this reason I granted the rule. I adhere to the opinion I formed then on the merits.

I think there is nothing in the point raised as to the omission of the concluding part of the form in the information exhibited.

Judgment for defendant with costs.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE SIR CHARLES TOWNSHEND, C.J., GRAHAM, E.J. AND
RUSSELL, LONGLEY AND DRYSDALE, JJ.

REX v. COADY.

1. JUSTICE OF THE PEACE (§ III—13)—JURISDICTION—N.S. TEMPERANCE ACT.

Two justices of the peace appointed for the entire county and holding a session at the police office established in an incorporated town within the county under the Towns Incorporation Act, N.S., have concurrent jurisdiction with the stipendiary magistrate of the town to try a charge of selling intoxicating liquor in contravention of the Nova Scotia Temperance Act, 1910.

[*R. v. Giovanetti*, 5 Can. Cr. Cas. 157, 34 N.S.R. 505, referred to.]

DECIDED: January 2, 1915.

INFORMATION was laid against the defendant before two justices of the peace for the county of Inverness, residing in the

town of Inverness, charging the defendant with having sold intoxicating liquor within said town in violation of the provisions of the N.S. Temperance Act.

The information was tried and a conviction made by the justices sitting in the police office of the town of Inverness.

The conviction was attacked on appeal to the Judge of the County Court for District No. 6 on the ground that two justices of the peace for the county had no jurisdiction to try the case or to make the conviction, the information being brought on behalf of the town by the duly appointed prosecutor for the town, the offence alleged, in such case, being one that could only be dealt with by the police court of the town.

The learned Judge of the County Court having set aside the conviction, a case was stated for the opinion of the Court to determine the question whether two justices of the peace for the county had jurisdiction to try the information and make the conviction, sitting in the police office of the town under the N.S. Temperance Act.

D. McNeil, K.C., for appellant.

W. F. O'Connor, K.C., for respondent.

The judgment of the Court was delivered by

RUSSELL, J.—The question raised by this appeal is whether the jurisdiction is given by the N.S. Temperance Act, 1910 (ch. 2 of 1910), to two justices of the peace to try an information for violation of the Act within the town of Inverness, which was incorporated under the provisions of the Towns Incorporation Act. In the case of *Rex v. Giovanetti*, 5 Can. Cr. Cas. 157, 34 N.S.R. 505, it was held that a county stipendiary could convict for such offences in the town of Sydney, there being no exclusive jurisdiction given to the stipendiary for the town, as had been contended in that case. The Act relating to the appointment of stipendiary magistrates, ch. 33, R.S.N.S., was afterwards amended by ch. 11 of the Acts of 1905 by substituting the word "municipality" for "county," so that the stipendiary magistrates should thereafter be appointed not for counties but for municipalities, but no such amendment was made with reference to justices of the peace. They still continue to be appointed for counties as they have always been.

The N.S. Temperance Act, 1910, enacts, sec. 35, that any prosecution under the Act (or "this part") may be brought before any magistrate having jurisdiction where the offence was committed, and "magistrate" is by sec. 2 (d) defined to mean a "stipendiary magistrate or two justices of the peace."

It is contended that exclusive jurisdiction is conferred upon the town stipendiary by sec. 233 of the Towns Incorporation Act, which provides that there shall be in the town a police office to be established by the town council "where all police business of the town shall be transacted," and (sec. 234) the stipendiary magistrate is required to attend there daily or at such times as are necessary for the disposal of business, etc.

I do not think that these words are apt for the purpose of conferring an exclusive jurisdiction. The only question that could be raised under the section would be what I should incline to consider a very frivolous one, whether it was obligatory upon the justices to hold their court in the town office or whether this requirement was in some way limited to some particular kinds of business, or whether it was not merely directory. In any case, the words obviously refer to the place where the business is to be transacted and not to the functionaries by whom the jurisdiction is to be exercised.

For these reasons I think that the conviction was valid and must be affirmed.

Conviction affirmed.

[SUPREME COURT OF ALBERTA.]

APPELLATE DIVISION.

BEFORE STUART, BECK AND SIMMONS, JJ.

REX v. PRENTICE.

1. WITNESSES (§ II C—47)—PRIVILEGE—AUTHORIZATION OF SOLICITOR'S ACT.

The authorization or direction to a solicitor to send a letter on behalf of the client is not within the privilege between solicitor and client, and the latter, called as a witness in a criminal case in which he was the complainant, cannot on that ground decline to answer a question put by counsel for the accused whether he, the witness, had not authorized his solicitor, at or about the time the accused brought civil proceedings against the complainant, to write a particular letter which the solicitor had sent to the solicitor for the accused.

2. TRIAL (§ I C—10)—DISCRETION—RE-CALLING WITNESS ON COLLATERAL ISSUE AS TO CREDIT.

The Judge trying a criminal case without a jury has a discretion to refuse to re-call one of the accused who had given evidence on his own behalf for the purpose of giving further evidence tendered merely to confirm the credibility of one of his own witnesses as to a circumstance brought out on the latter's cross-examination which was not relevant to any fact in issue.

3. FALSE PRETENCES (§ I—10)—FRAUDULENTLY INDUCING EXECUTION OF VALUABLE SECURITY.

A cheque on a bank is a "valuable security" within the statutory definition of that term under Cr. Code, sec. 2 (40), although not covering the entire fund against which it is drawn, as regards the offence under Cr. Code, sec. 406, of inducing the execution of a valuable security by fraud.

[*R. v. Wagner*, 6 Can. Cr. Cas. 113; *R. v. Hope*, 17 Ont. R. 463; *R. v. Rymal*, 17 Ont. R. 227, referred to.]

DECIDED: October 23, 1914.

CROWN case reserved on a trial before Scott, J., as follows:—

"1. The defendants were charged before me at Edmonton on the 29th day of May, 1914,

" 'For that they, the said James Prentice and W. P. Wright, at Edmonton, in the Province of Alberta, at sundry and divers times between the 19th day of December, 1912, and the 6th day of June, 1913, did, by false pretences with intent to defraud, induce George Brown to write his name or cause his name to be written by way of countersigning on a number of cheques or orders drawn on the Bank of British North America at Edmonton, and signed by James Prentice & Company, in order that the said respective cheques might afterwards be converted into or used or dealt with as valuable security, and which said cheques or orders amounted in all to about six hundred and eighty-seven dollars and thirty-five cents (\$687.35).'

"Particulars were asked and were furnished as follows:—Particulars of the cheques referred to in the charge against the above-named accused and the false pretences relating thereto.

"1. The said accused falsely represented to George Brown that G. Christianson worked as a bricklayer on the Pantages Theatre, a building in the course of construction, for a certain time ending December 20, 1912, whereby the said George Brown countersigned or caused to be countersigned a cheque dated December 20, 1912, drawn by James Prentice & Company, on the Bank of British North America, for sixty-eight dollars and

eighty-five cents (\$68.85), payable to G. Christianson or order, and the said cheque was cashed by the said bank out of the funds belonging to the said Brown and held in trust by the accused, Prentice.

"Similar particulars were given with regard to the following cheques in as many different paragraphs:—

January 3, 1913.....	\$62.90
February 1, 1913.....	39.55
February 14, 1913.....	36.95
February 28, 1913.....	34.50
March 28, 1913.....	72.90

and particulars were also given of the following, the only difference being that Christianson was falsely represented as working as a carpenter:—

March 14, 1913.....	\$69.80
April 11, 1913.....	48.15
April 25, 1913.....	48.40
May 9, 1913.....	84.45
May 23, 1913.....	63.30
June 6, 1913.....	47.60

There are, in all, 12 paragraphs of particulars, each containing the allegations with respect to one cheque.

"1. In the course of the cross-examination of George Brown, counsel for Prentice directed certain questions to him on the subject of when he first considered commencing criminal proceedings, and inquired whether it was not at about the time certain civil proceedings were commenced by Prentice against Brown, in which Prentice made large claims in respect of certain building contracts. Counsel for Prentice then asked the witness: 'You remember instructing your solicitors to communicate with Prentice's solicitors at that time?' I instructed the witness not to answer, and the following discussion then took place:—

"*Mr. Biggar:* If the solicitor can communicate to other people and the person who moves him cannot be asked if it was on his authority, it puts the solicitor in a very happy position. I am asking if he authorized his solicitor to do something, some particular thing.

"*THE COURT:* If you show first that he later did a certain thing.

“*Mr. Biggar*: I cannot interpose a witness.

“*THE COURT*: All right, you cannot ask the question.

“*Mr. Biggar*: Does your Lordship think I am at liberty to interpose a witness?

“*THE COURT*: No, I do not think so.

“*Mr. Biggar*: Your Lordship suggested that if I prove if the solicitor had done something, I can ask the witness if he authorized it. Now, I am simply suggesting, even if there is a way to interpose, that your Lordship's suggestion should be given effect to in anticipation of the question.

“*THE COURT*: No, I am merely holding that you cannot ask the question that you are now putting.

“*Mr. Biggar*: Well, perhaps I am putting it in that form. What I want to inquire is whether he authorized his solicitor to take certain steps with regard to the institution of inquiries for the purpose of instituting criminal proceedings against the present defendant. Your Lordship rules against me. Very good. My friend, Mr. Ford, asks that your Lordship would at this stage rule against him on exactly the same point.

“*THE COURT*: Yes.’

“Was I right in excluding the evidence?

“2. George Brown, in cross-examination, denied having had an interview in his office with two men, named Jacinsky and Miller, and denied having at any such interview asked Jacinsky to make representations to Wright that, if Wright could give evidence against Prentice, he (Brown) would be ready to take him (Wright) into his (Brown's) employ and see that he (Wright) got off all right. Miller was called as a witness for the defence and gave evidence that Brown had told him and Jacinsky that if Wright would come down to him and explain the whole thing to him, he would put him all right. The witness added that he took from this that Brown was going to go after Prentice. An application was later made to me to allow Wright to be recalled for the purpose of giving evidence as to his conversation with Jacinsky. I refused to permit this. Was I right in so doing?

“3. Before the evidence began it was objected that the charge, which was laid under sec. 406 of the Criminal Code, charged no offence, as cheques of the kind described were not within the definition of ‘Valuable security’ contained in sec. 2, sub-sec. 40.

I ruled that they were so, after having permitted an amendment to the charge as originally drawn by inserting after the word 'cheques' the words 'or orders,' which appear in it as above set out.

"Is the definition of valuable security sufficiently wide to bring documents of the kind in question within it in the absence of allegation or evidence that each covered the whole of the deposit?

"With respect to the first and second questions reserved, I did not consider, and cannot say whether or not the admission of the evidence rejected would have affected the conclusion at which I arrived in convicting the accused."

E. B. Cogswell and *A. G. MacKay*, K.C., for the prosecution.

O. M. Biggar, K.C., for defendant Prentice.

Frank Ford, K.C., for defendant Wright.

STUART, J.:—I agree, for the reasons given by my brother Beck, in the answer he proposes to give to the first question reserved. With regard to the second question, however, I feel compelled to take a different view.

The accused was charged with the crime of forgery. The complainant was one Brown, who was a chief witness for the Crown at the trial. The defence attempted to attack the credibility of Brown by shewing bias or improper motive. This the defence was, of course, entitled to do, but it must be remembered that the existence or non-existence of bias or improper motive was a mere subordinate issue. The decision of that issue was only of importance for the purpose of affecting the credibility of Brown. Then, when evidence of conduct on the part of Brown tending to shew bias was given, a still more subordinate issue of fact appeared, because the conduct alleged was denied. It was with respect to this subordinate issue of fact, viz., whether the alleged conduct tending to shew bias had in fact occurred, that there was a conflict of testimony and a subordinate question of credibility again arose. The way in which the matter arose was this: Brown, in cross-examination, denied having had an interview in his office with two men named Jacinsky and Miller, and denied having at such interview asked Jacinsky to make representations to Wright (one of the accused) that if

Wright could give evidence against Prentice, he (Brown) would be ready to take him (Wright) into his (Brown's) employ and see that he (Wright) got off all right. Miller was called as a witness for the defence, and gave evidence that Brown had told him and Jacinsky that if Wright would come down to him and explain the whole thing to him, he would put him all right. Miller added that he took from this that Brown was going to go after Prentice. The defence afterwards applied to allow Wright to be recalled for the purpose of giving evidence as to his conversation with Jacinsky. This the trial Judge refused.

The exact questions proposed to be put to Wright upon his recall are not stated in the case, and if we confine the matter strictly to what is before us, it seems to me that we cannot possibly interfere with the decision of the trial Judge. Every subject of conversation, no matter of what kind, between Wright and Jacinsky would certainly not be *ipso facto* admissible in evidence. It was stated to us, however, that the conversation proposed to be proven was to the effect that Jacinsky had in fact conveyed such a message to Wright as was suggested in Miller's testimony. I assume that the evidence of Miller was capable of bearing the construction that Brown was suggesting to Miller and Jackinsky that they or one of them should go and tell Wright what he said.

It seems to me the case stands somewhat like this: Jacinsky was not called as a witness, for what reason we do not know. But, suppose he had been called and had said that Brown had told him to go and give Wright the message referred to, and suppose counsel had then asked, "and did you go and give the message to Wright?" would not that question have been excluded as irrelevant? I think it would have been, strictly speaking, inadmissible, although, doubtless, little objection would in such a case be made. The fact was not relevant to either the main issue or the subordinate issue of bias. In Jacinsky's own mouth the last five words of such a sentence as "Brown told me to tell Wright that, and I told him, too," could only be self-confirmatory.

Then, instead of that situation, we have *Miller* swearing that Brown sent a message by Jacinsky, we have Jacinsky not called at all, and then Wright, one of the accused, who had listened to Miller's testimony, proposed to be recalled to say that Jacinsky

had delivered the message. The delivery of the message was not relevant to any fact in issue, but was only suggested as confirmatory of Miller's story that a message had been sent, the sending of the message being the only really relevant fact. Certainly, if Jacinsky could not tell about his conveyance of the message, there seems little reason why the accused should listen to Miller and then jump up and say "yes, and I received that message from Jacinsky," and ask that evidence to be considered as having any probative force in confirming the testimony of his witness Miller. If a third and disinterested person had testified to having heard Jacinsky give the message, it is possible that his evidence might be technically admissible. But it seems to me that in the actual situation it was at least a matter for the trial Judge's discretion.

Moreover, I think we reach here ramifications which have become too detailed. Wigmore on Evidence, at par. 951, in referring to the question of the admissibility of the details of a quarrel out of which bias is alleged to have arisen, says:—

"In two ways inconvenience may ensue: (1) The detailed inquiries, the denials, and the explanations are liable to lead to multifariousness and a confusion of issues."

The other inconvenience is not relevant here, but the author goes on to say that it is commonly held that the details of a quarrel or other conduct may be excluded in the trial Court's discretion. Although we have not here a question of details of a quarrel, yet the situation was not dissimilar. The matter was reaching into ramifications both of issues and credibility. The trial Judge may well have thought that the matter had gone far enough. There being no jury there, he may have decided that the proposed evidence of the accused Wright tendered merely to confirm the credibility of one of his own witnesses, whose testimony he had already listened to would be of no real value or assistance to him in any case. I think the evidence, if admissible at all, which I doubt very much, was only admissible in the trial Judge's discretion. I cannot see that that discretion was improperly exercised in the circumstances of the present case or that any wrong was done to the accused. I would, therefore, answer the second question in the affirmative.

I would also answer the third question in the affirmative.

The charge was one under sec. 406 of the Criminal Code. The documents in question were cheques on the Bank of B.N.A. The question reserved is whether the definition of a "valuable security" contained in sec. 2, sub-sec. 40, of the Code is sufficiently wide to bring documents of the kind in question within it in the absence of allegation or evidence that each covered the whole of the deposit.

In my opinion, we do not need to rest upon the first part of the definition of a valuable security. The second part says that

"valuable security" . . . also includes any debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money, whether of Canada or of any province thereof, or of the United Kingdom, or of any British colony or possession, of any foreign state."

The only reason urged why these cheques should not be considered as "bills or orders for the payment of money" was that the true interpretation of the clause quoted is that the documents described must be documents "of," i.e., *issued by*, Canada or any province thereof, etc., and that the clause does not mean merely "money of Canada, etc.," in the sense of defining the currency, because, so it was said, the inclusion of the words "or of any province thereof" could not have any meaning in such a case, inasmuch as a province does not control or issue currency. But it seems to me that the reference is clearly to currency. Both the definition and the crime go at least as far back as the Larceny Act, 32-33 Vict. ch. 21, sec. 95 and sec. 1. That was in 1869, just two years after confederation, when the provinces ceased to have the right to control currency. The reference to the provinces was obviously put in in order to cover any belated case of reference in the document to old currency and the retention of the words is simply a survival. The cases of *Rex v. Wagner*, 6 Can. Cr. Cas. 113, *Reg. v. Hope*, 17 O.R. 463, and *Reg. v. Rymal*, 17 O.R. 227, all dealt with documents not issued by any government, but merely by private persons, and in none of those cases was the present argument advanced at all. It was apparently tacitly assumed that the reference in the definition was merely to currency and to nothing else. For these reasons I think the documents came within the meaning of the portion of the definition to which I have referred.

I agree that a negative answer to the first question involves the necessity of a new trial. If we had all the evidence before us, it is perhaps possible that we might conclude that no substantial miscarriage of justice or wrong had been done, but, as the case is stated, I think we must decide that the exclusion of relevant evidence touching the credibility of an important witness must be treated as a substantial wrong to the accused.

BECK, J.:—The first question raises this point: Can a witness, on the ground of privilege, be allowed to refuse to answer the question whether he authorized or directed his solicitor to make a certain communication to the solicitor for the opposite party in anticipated or pending litigation. The learned Judge's ruling is distinctly placed on the ground of privilege in the witness, not on the ground that the question was irrelevant or vexatious (Rule 199). The whole question of privileged communications between client and solicitor is discussed at great length in Wigmore on Evidence, ch. LXXX. The rule is there formulated, par. 2292, with, I think, sufficient accuracy:—

“Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the client waives the protection.”

It surely is beyond question that the contents of the communication itself from the witness' solicitor to the solicitor for the opposite party which, in order to avoid confusion I shall call the letter, do not come under the privilege, for the contents of the letter were *ex hypothesi* intended to be made known to a third party in adverse interest, and therefore neither the contents nor the actual letter itself can possibly be said to have been communicated by the client to the solicitor in confidence. It seems almost, if not equally, plain that the authorization or direction to send the letter does not come under the privilege, for the mere authorization or direction is not a statement made for the purpose of obtaining advice. The question of fact whether or not the authorization or direction was given “is not within the mischief which that rule is intended to guard against; and

therefore, is not within the rule": *Desborough v. Rawlins*, 3 Myl. & Cr. 515, 40 E.R. 1025. I, therefore, think the ruling of the learned trial Judge in respect of the first question reserved was wrong.

The second question raises some difficult points: The evidence of a person present and hearing a communication made by another to a third party clearly is equally admissible with the evidence of the person by or to whom the communication was made. The fact that the communication is suggested to be an authorization or direction cannot affect the question. Miller's evidence was, therefore, admissible. His evidence, however, fell short of what the question to Brown suggested it would be. Miller's evidence was to the effect that Brown had said to him and Jacinsky that if Wright (one of the accused) would come to Brown and explain the whole affair to him, he would put him all right, and that from this statement of Brown's he inferred that Brown was intending to prosecute Prentice (charged jointly with Wright in this prosecution). The question to Brown suggested that Brown had requested Jacinsky to convey to Wright what Brown had said. It seems to me that, under the circumstances, it was quite open to counsel for the accused to contend that by implication there was such a request on Brown's part or at least an authorization. If this is so, would the evidence of Wright to the effect that Jacinsky did in fact convey to him such a message as coming from Brown be admissible, although but for some proof of Jacinsky's authority to convey it, it would clearly not be admissible? It seems to me that it was admissible as going to the credit of Brown in relation to his denial of the conversation, and therefore to his evidence generally. It is true that the general rule is that a witness cannot be contradicted with regard to matters irrelevant to the issue, but to this there is an exception if the matter suggested by the question, though irrelevant, would tend to shew that the witness was biased against the opposite party: *Phipson on Ev.*, 5th ed., pp. 477-8. It seems to me that if Brown were shewn to have made the statement which he denied, bias against Prentice would be shewn or could be inferred. The evidence excluded was tendered by Prentice's counsel. But then it may be urged that this goes no further than to say that Miller's evidence on that point was

properly received; but I think it goes further than that. I think that had the evidence of Wright upon this point been admitted, it would have been a not improper observation of the trial Judge to make to the jury, had there been one, to have said:—

“Gentlemen,—The credibility of Brown has been attacked; it is urged that he has a strongly antagonistic feeling towards Prentice. In considering whether this is so, it will be proper to consider in what respects Brown has been contradicted by other witnesses. He has been contradicted by Miller with regard to a conversation said to have taken place between Brown, Miller and Jacinsky, and, in trying to determine whether you believe Brown or Miller, it will be proper for you to advert to the fact that (assuming such evidence had been given) what Wright says Jacinsky did in fact tell him agrees with Miller’s evidence about the conversation with Brown.”

It seems to me, therefore, that the evidence of Wright was admissible as confirmatory of the evidence of Miller for the purpose of shewing bias on the part of Brown against the accused Prentice, and that, as the question before us is apparently intended to raise the substantial ground of the admissibility of the evidence—(Wright was proposed to be called before the conclusion of the evidence for the accused)—the learned Judge’s ruling should be held to have been wrong.

The third question is substantially whether a cheque on a general current account is a “valuable security.”

The interpretation which counsel for the accused seek to put upon the words of sec. 2, sub-sec. 40, of the Criminal Code, interpreting “valuable security,” is this: That, whereas the opening words are “any order, exchequer, acquittance or other security entitling or evidencing the title of any person to *any share or interest in* any public stock or funds, etc., or in any fund of any body corporate, company or society, etc.,” and then says: “Or to any *deposit* in any savings bank or other bank,” the use of the words “any share or interest in” in the first case shews that, these words not being repeated before the word “deposit,” the intention was not to cover any share or interest in a deposit, but a deposit as a totality. I think this argument not sound. The answer to it could be put in more ways than one; but perhaps

the clearest is this: The expression "share or interest" does not mean merely any kind of an interest, share being taken in the sense of an interest only coupled with the idea of proportion, but means a share—in the sense in which it is used in speaking of a share in the capital stock of a company—or other interest of a like nature, such as stock, funded exchequer bills, or funded securities guaranteed by the Government. In this view the comparison or contrast is between "deposit" and "share or interest," not "any public stock or fund," and "any share or" other "interest" of a like nature is then seen to be in the same category as "any deposit," and each is a totality in the same sense, and then, as the greater includes the less, and the whole includes all its parts, to both "any share or interest" and to "any deposit" may be added the words "or any part thereof or interest therein." I think, therefore, the learned Judge's ruling on this point was right.

Having held that certain evidence tendered on behalf of the accused was improperly not received, I think there should be a new trial. I think the evidence rejected may reasonably be supposed to be of such a character that, if given, it might have affected the mind of the trial Judge in deciding whether or not the defendant was guilty. The Judge himself says that he cannot say whether it would or not. I think, therefore, "some substantial wrong or miscarriage was thereby occasioned on the trial" (sec. 1019). See *Makin v. A.-G. for New South Wales*, [1894] A.C. 57.

SIMMONS, J.:—The defendants were tried before Mr. Justice Scott without a jury for that they did by false pretences with intent to defraud induce George Brown to write his name or cause his name to be written by way of countersigning on a number of cheques or orders drawn on the Bank of B.N.A., and signed by James Prentice & Co., in order that the said respective cheques might afterwards be converted into or used or dealt with as a valuable security. Three questions are reserved by the trial Judge:—

The first one arises out of a question of privilege in regard to a communication made by a witness Brown to his solicitor. In the course of cross-examination of George Brown, counsel for Prentice directed certain questions to him on the subject of when

he first considered commencing criminal proceedings, and inquired whether it was not about the time certain civil proceedings were commenced by Prentice against Brown arising out of a building contract, and counsel asked the witness: "You remember instructing your solicitor to communicate with Prentice's solicitors at that time?" The learned trial Judge instructed the witness not to answer on the ground of privilege.

Wigmore on Evidence, ch. LXXIX., par. 2285, gives four fundamental conditions necessary to the establishment of privilege between persons standing in a given relation:—

"(1) The communications must originate in a *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which, in the opinion of the community, ought to be sedulously *fostered*. (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."

It has long been established by authority that *primâ facie* in a communication between solicitor and client all four requisites are present. Jessel, M.R., in *Anderson v. Bank of B.C.*, L.R. 2 Ch. 644, defines the object and meaning of the rule as follows:—

"That, as by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights, or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and, it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to him should be kept secret *unless with his consent* (for it is his privilege and not the privilege of his confidential agent), that he should be enabled properly to conduct his litigation."

The client can remove the privilege by consent, and in the case under consideration the question is based upon the assumption that the witness did consent to removal of the privilege by instructing his solicitor to communicate something *prima facie* privileged.

I conclude, therefore, that the ruling of the trial Judge was incorrect.

As to the second question reserved, the facts are set out in the reasons of my brother Stuart, and I am of the opinion that the trial Judge properly exercised his discretion in refusing to allow the question. If the contrary view is taken, it seems difficult to draw the line in which legitimate cross-examination should be confined upon an issue secondary to the main issue—namely, attacking the credibility on the ground of bias. The third question should, I think, be answered in the affirmative. I think the documents in question come within the definition of valuable security (sub-sec. 2 of sec. 40 of the Code), and may properly come within either the first part or the second part of the section in question. The first question having been answered in the negative, there should be a new trial.

New trial ordered.

[SUPREME COURT OF ALBERTA.]

BEFORE BECK, J.

REX v. TALLY.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ II E—44)—SUFFICIENCY OF DESCRIPTION OF OFFENCE—COMMON ASSAULT.

An information charging that the accused "threatened" the complainant with an axe, "contrary to sec. 291 of the Criminal Code," is sufficient to charge the offence of common assault for which that section of the Criminal Code provides.

2. INDICTMENT, INFORMATION AND COMPLAINT (§ I—2)—AMENDMENT OF INFORMATION—RE-SWEARING.

It is not essential that an information before a magistrate should be re-sworn after being amended at the hearing, if the amendment merely gives greater particularity or certainty to the charge without changing the charge to an offence of a different kind or alleging it as of a time or place materially different from that first alleged.

3. SUMMARY CONVICTION (§ VI—60)—IRREGULARITY IN INFORMATION—WAIVER BY FAILURE TO OBJECT.

An irregularity in not re-swearing an information in a summary conviction matter when materially amended at the hearing is waived by proceeding with the trial without taking the objection.

[*R. v. Lewis*, 6 Can. Cr. Cas. 499, approved.]

4. SUMMARY CONVICTION (§ VI—60)—DEFECT IN INFORMATION CURED BY DEPOSITIONS.

If the depositions in a summary conviction matter establish such facts as warranted the justice in convicting of the offence indicated by the information, although not stated in the latter in correct form, Code sec. 724 applies to validate the conviction regardless of the defect in the information.

5. SUMMARY CONVICTION (§ II—20)—TERRITORIAL JURISDICTION OF MAGISTRATE—INCONVENIENT PLACE OF TRIAL.

Where, as in Alberta, justices of the peace are appointed with territorial jurisdiction extending over the entire province, an objection that the charge was not laid before the nearest justice will not be a ground for quashing the summary conviction unless there has been a gross abuse of authority in compelling the attendance of the accused at a far-distant and inconvenient place of trial, notwithstanding the availability of a justice at a convenient place of trial, under circumstances amounting to a denial of the right of the accused to make his "full answer and defence" (Cr. Code, sec. 715).

[*R. v. Farrell*, 15 Can. Cr. Cas. 100, referred to.] •

6. JUSTICE OF THE PEACE (§ III—13)—EXCLUSIVE JURISDICTION OF FIRST JUSTICE TAKING COGNIZANCE OF CASE—IMPLIED REQUEST TO SECOND JUSTICE TO ACT.

Under a statutory provision limiting a justice's jurisdiction in any particular case to the first justice having possession and cognizance of the fact but with a proviso that at such justice's request any other justice may at the first justice's request "take part in" the case, a request to the second justice may be implied from the conduct of the justice who received the information, and in view of Cr. Code sec. 1120, such request will be implied and the conviction upheld where both the justice receiving the information and another sat at the hearing, but because of objection raised by the family of the accused to the first justice acting, he voluntarily refrained from trying the case.

[*R. v. Cruikshanks*, 23 Can. Cr. Cas. 23, 16 D.L.R. 536, followed; *R. v. Ackers* (No. 3), 16 Can. Cr. Cas. 222, and *R. v. McGregor*, 2 Can. Cr. Cas. 410, referred to.]

7. TRIAL (§ I A—2)—CRIMINAL CASES—TWO PERSONS SEPARATELY CHARGED ON IDENTICAL EVIDENCE—INTERMIXING OF TRIALS.

Where the assaults charged separately against two persons took place as part of one and the same occurrence, and the evidence would have been identical in each case, it is not a ground for quashing the summary conviction in either case that the two cases were tried together, particularly where no exception was taken at the trial.

[*R. v. Lapointe*, 20 Can. Cr. Cas. 98, 4 D.L.R. 210, and *R. v. Fry*, 19 Cox C.C. 135, 62 J.P. 457, applied.]

8. SUMMARY CONVICTIONS (§ VII B—80)—FORM—DATE OF OFFENCE.

An objection that a summary conviction for common assault assigns no date to the offence is cured under Cr. Code sec. 1124 if the date appears on the depositions.

9. CONTINUANCE AND ADJOURNMENT (§ II—8)—CRIMINAL TRIAL—DISCRETION OF MAGISTRATE.

Unless it appears that the refusal of a magistrate to grant an adjournment of the hearing results in the accused being prevented from making his "full answer and defence" (Cr. Code sec. 715), the magistrate's *bonâ fide* exercise of discretion cannot be reviewed.

[*R. v. Irwing*, 14 Can. Cr. Cas. 489, referred to.]

DECIDED: January 23, 1915.

MOTIONS by the respective defendants to quash the summary conviction made against him.

J. M. Macdonald, for defendants.

Popple, for the Crown.

BECK, J.:—These are two motions to quash convictions, the proceedings being—or being taken to have been—certified to the Court in pursuance of the notices of motion given in pursuance of the new rules in that behalf.

A number of objections are taken.

1. "That the informations charge no offence."

The information in one case is a charge that the defendant "did wilfully run into my hay rack and injured the same, and did threaten me with an axe"; in the other: "did threaten me with a pitch fork."

Whether or not these informations disclose an offence in law, I think any defect that may exist cannot affect the validity of the conviction, and this for two reasons: First, both the informations were amended by the addition of the words "contrary to sec. 291 of the C.C." That section reads:—

"Every one who commits a common assault is guilty of an indictable offence, and liable, if convicted . . . on summary conviction," etc.

This addition, at all events, made the intent and meaning of each charge quite clear as a charge of common assault. The objection is taken that the information was not re-sworn after amendment.

It seems to me that in no case is it necessary to re-swear an information after an amendment, if the amendment is of such a nature only as that it merely gives greater particularity or certainty to the charge and does not amount to the laying of a new charge, *i.e.*, a charge of a different kind of offence or of a similar offence at a time or place materially different from that first alleged.

Even if the accused had a right to insist upon the informations being re-sworn, they waived the irregularity—if such it was—by refraining from taking the objection: *R. v. Lewis*, 6 Can. Cr. Cas. 499.

Secondly, sec. 724 of the Code, which forms part of Part XV., "Summary Convictions," says that:—

"No objection shall be allowed to any information . . . for any alleged defect therein in *substance* or in form or for any variance between such information . . . the evidence," etc.

So that if the evidence, as it appears in the depositions, establishes such facts as justified the justice in convicting of a common assault, and if he did so, the wording of the informations may be disregarded. This, I think, might have been said even if the informations had not been amended, inasmuch as they at least indicate, if not allege, a common assault. With the amendment it seems to me no question can arise.

2. Another objection is that the charges should have been, and were not, laid and heard before the nearest magistrate.

The provincial legislation respecting police magistrates and justices of the peace is ch. 13 of 1906; ch. 5, sec. 9, of 1907; ch. 20, sec. 10, of 1908; ch. 4, sec. 8, of 1909.

Section 2 of ch. 13 of 1906 says that the Lieutenant-Governor in Council may appoint justices of the peace for the province, who shall have jurisdiction as such *throughout the same*.

There is no statutory provision requiring a charge to be laid or dealt with by the nearest justice, nor is there any other law that I am aware of requiring this; though I have no doubt that if it appeared that there was gross abuse of the authority of a magistrate by, for example, compelling the attendance of the accused at a place extraordinarily far from his home and the place where the offence was alleged to have been committed and where all the witnesses resided, while a competent and impartial justice was available near the place of the alleged offence, this Court would have power to intervene and prevent the abuse of the process of the inferior Court on the ground that the defendant was prejudiced in his right to "make his full answer and defence" (sec. 715, Code), and that therefore the magistrate lacked jurisdiction: *Rex v. Farrell*, 15 Can. Cr. Cas. 100.

3. The third objection is that the charge was not tried by the justice who took the information, and there is no evidence of a request to the convicting justice to try the case.

Section 9 of ch. 5 of 1907 adds a section to ch. 13 of 1906, as follows:—

"9a. Jurisdiction in any particular case shall exclusively attach in the first justice of the peace, or where more than one justice is required the first justices to the required number duly authorized, who has or have possession and cognizance of the fact. Provided that at the request of any such justice, or at the unanimous request of any such justices where more than one justice is required, any other justice or justices may take part in any case."

The informations were sworn before William Dives, J.P. The cases were tried before and the convictions made by William Macdonald, J.P.

The convictions are in the usual form—the form provided by the Criminal Code, Nos. 31, 32, 33:—

"Be it remembered that on the.....day
of....., in the year....., at.....
A.B. is convicted before the undersigned....., a
justice of the peace for the said" (province).

Neither these forms nor the convictions in the present cases shew the information to have been laid otherwise than before the convicting magistrate. This, however, is shewn by the papers produced before me, namely, the informations; but other papers also produced, namely, recognizances on the part of both accused to keep the peace, bearing the same date as the convictions and alleging the same offences, appear to have been taken at the same place before both Dives and Macdonald as justices of the peace. It would appear, then, that the justice before whom the information was laid was present when the justice, Macdonald, heard the case. Furthermore, in an affidavit filed on behalf of the defendants it is said:—

"I further asked him" (Macdonald) "if he had any request from the justice of the peace who took the information, to try the case, and he said that he had not, and that it was the fault of the mother of the accused, as she objected to them being tried before the justice of the peace who took the information."

I infer from this that owing to objection Justice Dives refrained from trying the case, and thereby inferentially consented and requested Justice Macdonald to try the cases. An implied request

is sufficient: *Rex v. Cruikshanks*, 23 Can. Cr. Cas. 23, 16 D.L.R. 536.

In *The King v. Ackers (No. 3)*, 16 Can. Cr. Cas. 222, it was held that while the conviction could not be supported, inasmuch as it did not appear on its face that the convicting magistrates acted at the request of the police magistrate before whom the information was laid, there being a statutory provision to the effect that no other justice should in such case act except in case of the illness or absence or at the request of the police magistrate, yet the defendant should not be discharged (the application was for *habeas corpus*), but the conviction should be remitted to the convicting magistrates for amendment according to the facts. This order was made in pursuance of a provision of the Ontario Liquor License Act, but it seems clear that a similar power exists under sec. 1120 of the Criminal Code. Being of opinion that the convicting magistrate was fully justified in convicting, I would, if I was not satisfied that there was not an implied request, have directed that the convictions be remitted to the convicting magistrate to be amended by inserting in the convictions after the word "province" the words, "acting in this behalf at the request of William Dives, a justice of the peace in and for the said province, before whom the information herein was laid," if this be according to the fact, instructing the convicting magistrate in accordance with the decision of this Court in *Rex v. Cruikshanks*, *supra*, that an express request is not essential under the Act, but that a request may be implied from the conduct of the justice who received the information.

But the convictions appearing to be valid on their face, and I myself being satisfied by the extrinsic evidence that there was a sufficient request by implication, I think the objection may be disregarded in view of sec. 1124: *R. v. McGregor*, 26 O.R. 115, 2 Can. Cr. Cas. 410; *R. v. Perrin*, 16 O.R. 446.

4. The next objection is that the two charges—that is, separate charges of common assault against each of the defendants—were tried together without the consent of the defendants.

The depositions shew that had the cases been tried separately the evidence would have been identical in each case; that, in other words, the assaults, charged separately against each defendant, both took place as part of one and the same occurrence.

Under these circumstances no possible injustice could be done to either defendant, and the reasoning in the cases of *R. v. Fry*, 19 Cox C.C. 135, 62 J.P. 457, and *The King v. Lapointe*, 20 Can. Cr. Cas. 98, 4 D.L.R. 210, leads to what I think is the proper conclusion that the convictions should stand as against this objection—at all events, as it does not appear that any exception was taken at the hearing to this course being taken.

5. The next objection is that the informations and convictions contain two separate and distinct offences.

This objection is virtually dealt with under the head of the first objection. In any case, it is evident that in each case the charge was treated as one of common assault; and if this offence is improperly or insufficiently set forth in the convictions, the objection on this ground is ineffective by reason of sec. 1124, inasmuch as on a perusal of the depositions I am satisfied that an offence of the nature described in the conviction has been committed.

6. A sixth objection is that evidence was wrongfully admitted by way of a petition.

I do not find that this objection is established as a fact. There is such a petition, but it is attached to the recognizances to keep the peace. I would presume that it was used by the magistrate—and I suppose improperly—in connection with binding the accused over to keep the peace; but there is nothing to shew that it was used as evidence on the charges of assault or that it influenced the magistrate in determining the question in issue on the trial.

7. It is objected that the evidence does not sustain the conviction. Though the evidence for the prosecution is met by an *alibi* in each case, it, if believed by the magistrate, certainly supports a conviction of both defendants for a common assault.

8. It is objected and the fact is that the conviction assigns no date to the offence. This defect, however, can be supplied from the depositions by virtue of sec. 1124, already referred to.

9. It is objected that the information was not re-sworn after amendment. I have already dealt with this when dealing with the first objection.

10. It is alleged that the defendant Ivan Tally asked for an adjournment in order that he might have counsel to represent him.

The fact of the request and the magistrate's explanation appear in an affidavit filed on behalf of the defendant, which states:—

“I asked him” (the magistrate) “also why he did not grant the request of the accused for an adjournment to get counsel, and he said it was impossible, as the witnesses were there from a long distance, and he himself was going away to the country the next day and would be absent some considerable time.”

The place of trial was Morinville, some 25 or 30 miles from Edmonton, the nearest point at which counsel could be procured, if there were none at Morinville, where, if there is a practicing barrister or solicitor, there is only one.

Unless it appears that the refusal of a magistrate to grant an adjournment results in the accused being prevented from having a fair trial—from making “his full answer and defence”—the magistrate's *bonâ fide* exercise of discretion cannot be reviewed. Without going so far as to say that in no case, however intricate and serious, would a magistrate's refusal of an adjournment for this purpose induce the inference that the accused had been deprived of a fair trial, I think he could not reasonably be considered to have been prejudiced in such a case as the present: see *R. v. Irwing*, 14 Can. Cr. Cas. 489.

11. It was said the costs fixed were excessive. I cannot find this substantiated.

The motions should be dismissed with costs.

Motions refused.

[SUPREME COURT OF ALBERTA.]

BEFORE SCOTT, BECK AND WALSH, JJ.

REX v. MARCEAU.

1. DISORDERLY HOUSES (§ I—5)—OFFENCE OF KEEPING—STATING PLACE OF OFFENCE.

A conviction made by a magistrate for keeping a bawdy house will not be quashed because it is not expressly shewn in the depositions that the street address referred to in the depositions was in fact in the city which was named as the place of the offence in both the information and the formal conviction, although the magistrate's jurisdiction was limited to that city.

[*R. v. C.P.R.*, 14 Can. Cr. Cas. 1, 1 A.L.R. 341, applied.]

DECIDED: January 28, 1915.

APPEAL under Alberta Crown practice Rule 20 from an order of Stuart, J., refusing to discharge from custody and to quash the conviction of accused for keeping a bawdy house.

J. McK. Cameron, for appellant.

James Short, K.C., for the Crown.

SCOTT, J., concurred with WALSH, J.

BECK, J.:—Had this been a case in which the conviction was invalid on grounds which might be met under sec. 1124 of the Code by amendment, where the Court or Judge, upon a perusal of the depositions, is satisfied that an offence of the nature described in the conviction has been committed over which the Justice had jurisdiction, I should, had it come before me in the first instance, in all probability, have refused to amend on the ground that, though the magistrate was satisfied, I was not.

The evidence at best is slight and inferential, and depends on the evidence of disreputable witnesses, who, out of their own mouths, admit the practice of immoral methods in connection with the case. The principal witness is one Ogden. He was employed by the Calgary police, paid for his services, and provided with money for his out-of-pocket expenses. He went to the accused's house says he had sexual intercourse with her, and paid her \$3. He had been, it is stated in the evidence, supplied with "marked money."

Another witness is Detective Turner, who sent Ogden to the accused's house. Turner and another constable say they waited outside the house till Ogden came out. Then they indicate that they made a pretence of arresting Ogden as a frequenter and took him back to the house. There they searched for the marked money and could find none. The magistrate's decision rests wholly on the evidence of these three men—men of no moral sense, adopting, according to their own account, immoral and disreputable methods. And their evidence, such as it is, goes only to one act and a very ambiguous statement of the accused. The three witnesses are, on their own admission, *participes criminis* with the accused, and, for my part, I should not be

ready to take their uncorroborated story. I had, in a former case, occasion to comment on the same methods being used by the Calgary police force. I there said, in referring to a result unfavourable to the prosecution, "If that is the result, I shall have no regret. I say this because of what I look upon as irregular, immoral and disreputable methods adopted by members of the city police of Calgary to procure evidence on which to obtain a conviction. They employed two men, residents of Calgary, one a married man, for their purpose. These two men picked up two street walkers whom they had seen going in and out of the house; arranged to go to the house with them; each of these men paid \$1.50 for a room, to which they each took one of the women, to whom they each paid \$3 for actual prostitution; and it is quite clear, from these men's evidence, that they expect, not only payment for their services, but a refund of their expenses. Their employers must at least have had a pretty correct surmise of the methods they would employ."

My former criticism has evidently had no influence upon the Calgary police, who continue the hypocritical and pharisaical pretence of being zealous in extirpating public vice by the secret adoption of the same vices.

It is time, in my opinion, that the mayor and council of Calgary, as representing the citizens generally, should publicly say whether they intend to tolerate such methods.

As the conviction is valid on its face and the evidence is sufficient to justify the magistrate in convicting, I regret that I have to concur in the dismissal of the application.

WALSH, J.:—The appellant was convicted by the police magistrate for the city of Calgary on a charge of keeping a bawdy house. Stuart, J., dismissed her application to quash the conviction and for her discharge from custody under it, and from his judgment an appeal is taken by her under rule 20 of the Crown practice rules.

The application rests upon three grounds, namely:—

(1) That there was no evidence to shew that the offence was committed in the city of Calgary, the jurisdiction of the convicting magistrate being limited to that municipality;

(2) That there was no evidence as to the date upon which it was committed; and

(3) That there was no or not sufficient evidence to justify the conviction.

The only reference in the depositions to the locality in which the offence was committed is that the house in question was ——— (a street number upon a named avenue was here given). Nowhere in them is the city of Calgary mentioned. In addition to the reasons given by the learned Judge for refusing to give effect to this objection, I think this point is disposed of by the judgment of this Court *en banc* in *Rex v. Canadian Pacific R. Co.*, 14 Can. Cr. Cas. 1, 1 A.L.R. 341. Stuart, J., in delivering the judgment of the Court in that case, says:—

“The information shews that the offence was alleged to have been committed within the province of Alberta, and we must presume that it was for such an offence that the defendant was tried and convicted. I do not think therefore, the Court ought, particularly when jurisdiction appears on the face of the conviction, to scrutinize the depositions in order to discover an absence of exact evidence to establish local jurisdiction.”

This statement exactly covers this case, for here it is shewn by the record that the charge upon which the woman was being tried and to which she pleaded was for an offence alleged to have been committed in the city of Calgary, and it was of that offence there committed that she was convicted, as appears on the face of the conviction.

Upon the second ground, I think it quite clear from the depositions that the date to which the evidence is directed is the day before that upon which the evidence was taken, namely, September 16, 1914, which is the date mentioned in the charge and in the conviction. In addition to the references to the evidence under this head which my brother Stuart gave in his reasons for judgment, I think that the statement of the witness, W. E. Turner, one of the detectives under whose directions the raid was made, in answer to a question as to why this house was raided, “I know we made an effort to catch it, yesterday,” plainly refers, or at any rate justified the magistrate in inferring, that it refers to the events in which the two Turners and Ogden took part which resulted in the procuring of direct evidence against the appellant and the subsequent raiding of the house.

This meets also, I think, Mr. Cameron's objection that the references in the deposition to "yesterday" might mean a time later in the day than the hour at which this evidence was procured and the raid was made.

As to the third ground, in my opinion the one act of sexual intercourse which the evidence shews to have occurred in this house, coupled with the statement which the witness Ogden swears that the appellant made to him that "she had not been doing this over three or four days," afforded sufficient proof, if believed by the magistrate, to stamp her house as a bawdy house

The reference in this statement is obviously to business of the character of that which the appellant and the witness were then negotiating, and is an admission upon her part that for three or four days before September 16 she had been engaged in carrying on that kind of business. I do not think there is any evidence of the general reputation of the house, but there are other facts, such as the finding in the house of all of the accessories of such a trade, which, coupled with the proof of the one act and the appellant's admission, constitute sufficient evidence of the character of the house to justify the conviction.

The appeal is dismissed with costs

Appeal dismissed.

[SUPREME COURT OF SASKATCHEWAN.]

JUDICIAL DISTRICT OF REGINA.

BEFORE HAULTAIN, C.J.

REX v. WEISS.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ I—4)—REQUISITES—LEAVE TO PREFER FORMAL CHARGE.

Leave to a private prosecutor to prefer a charge in Saskatchewan upon which, in lieu of an indictment, the accused would in that province be triable should be refused if the Attorney-General has instructed his agent not to prefer a charge although there has been a committal for trial for the offence, unless such a strong *prima facie* case is disclosed on the depositions as to suggest an attempt to stifle a proper prosecution.

2. INDICTMENT, INFORMATION AND COMPLAINT (§ I—4)—DISCRETION OF ATTORNEY-GENERAL IN ALBERTA AND SASKATCHEWAN.

In exercising the discretion given to the provincial Attorney-General in Saskatchewan and Alberta, under Cr. Code 873A, as to whether a

formal charge shall be preferred on the depositions on which there has been a committal for trial, the Attorney-General has practically to perform what would be Grand Jury functions in provinces where there is a Grand Jury system.

[*Re Criminal Code*, 16 Can. Cr. Cas. 549, 43 Can. S.C.R. 434, referred to.]

3. STAY OF PROCEEDINGS (§ I—5)—CRIMINAL PROSECUTION—CR. CODE, SEC. 962.

In provinces where there is no Grand Jury system and therefore no indictment the case is not in the provincial Supreme Court for trial until a formal charge in lieu of an indictment has been preferred, and a stay of proceedings by the Attorney-General cannot be entered under Cr. Code, sec. 962, in the event of no formal charge having been laid.

[Note that for purposes of sec. 962 the term "indictment" includes a formal charge under Code sec. 873A by the interpretation clause, Code sec. 2 (16), as amended 1907.]

DECIDED: January 20, 1915.

MOTION by private prosecutor for leave to prefer a charge of theft.

T. J. Blain, for applicant, the private prosecutor.

No one contra.

HAULTAIN, C.J.:—The accused, C. M. Weiss, was committed for trial at the present sittings of the Court by C. A. Berry, esquire, a justice of the peace, after preliminary inquiry into a charge of theft. At the opening of the Court, Mr. Sampson, agent for the Attorney-General, informed me that he was directed by the Attorney-General not to prefer a charge and to cause a stay of proceedings to be entered. Mr. Blain, on behalf of the private prosecutor, now asks me to allow him to prefer a charge under the provisions of sec. 873A of the Criminal Code. There can be no doubt that under that section I have the power to consent to a charge being preferred "by any person." The only question for me to consider is whether I should exercise that power in the present case.

Section 962 of the Criminal Code empowers the Attorney-General to direct a stay of proceedings "at any time after an indictment has been found against any person for any offence and before judgment is given thereon."

In this province we have no grand jury, so that an indictment cannot be found against any person. Strictly speaking, therefore,

this case has not reached the point at which a stay of proceedings can be entered.

Under the law as it now stands, the trial of a person charged with a criminal offence is commenced without the intervention of a grand jury, or even, it would appear, without a preliminary inquiry by a magistrate, by a formal charge in writing preferred

1. By the Attorney-General; or
2. By an agent of the Attorney-General; or
3. By any person with the written consent of the Judge of the Court; or
4. By any person with the written consent of the Attorney-General; or
5. By order of the Court.

In this province the practice with regard to criminal charges is as follows: When any person is committed for trial, the justice of the peace before whom the preliminary inquiry is held transmits the original depositions to the clerk of the District Court of the district in which the offence is alleged to have been committed. The local agent of the Attorney-General for the district then transmits a copy thereof to the department of the Attorney-General. Upon receipt of a copy of the depositions as aforesaid, the Attorney-General either authorizes the local agent to prefer a charge, under the provisions of sub-sec. 2 of sec. 873A of the Criminal Code, or instructs him not to prefer a charge in the matter.

In exercising this discretion the Attorney-General is practically performing the functions of the grand jury: see *In re Criminal Code*, 16 Can. Cr. Cas. 549, 43 S.C.R. 434. In the present case this practice has been followed, and Mr. Sampson, the agent of the Attorney-General, has been instructed not to prefer a charge and to enter a stay of proceedings. As I have already pointed out, a stay of proceedings does not appear to be the appropriate action, as there has been no indictment found, and the case is not in Court. If an indictment had been found by a grand jury the Attorney-General would have had the right to direct a stay of proceedings, or in earlier times, to enter a *nolle prosequi*.

"The Attorney-General alone has the power to enter a *nolle prosequi*, and that power is not subject to any control. His decisions when exercising such functions were not subject to review by the Court of Queen's Bench, and are not now subject to review

by the Queen's Bench Division or the Court of Appeal": *R. v. Comptroller of Patents*, [1899] 1 Q.B. 909, 914.

It must be admitted that there is not a complete analogy between a stay of proceedings or *nolle prosequi* and what has been done in this case. The practical result in this case is that the Attorney-General, on consideration of the whole matter, has instructed his agent not to lay a charge. As I have already pointed out, there is nothing in the Criminal Code to prevent me from consenting to a charge being preferred by any person. But I think that very strong reasons should be shewn to justify me in taking such a step, in face of the deliberate action of the Crown authorities. If the evidence taken on the preliminary inquiry disclosed such a strong *prima facie* case against the accused as to suggest an abuse of his judicial discretion by the Attorney-General, or an attempt to stifle a proper prosecution, I should have no hesitation about consenting to a charge being preferred. But (and it should be almost unnecessary to say so) I can find nothing of that sort in this case. On the contrary, after reading very carefully the large mass of evidence taken on the preliminary inquiry, I am convinced that the Attorney-General exercised a sound discretion in directing that a charge should not be laid.

I must, therefore, refuse the application.

Leave refused.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE GRAHAM, E.J., AND RUSSELL, LONGLEY, DRYSDALE, AND RITCHIE, JJ.

REX v. THOMPSON.

1. INTOXICATING LIQUORS (§ III J—91)—TRIAL OF OFFENDER—ABSENT DEFENDANT—PLEA OF GUILTY BY COUNSEL.

As the provisions of the Criminal Code, Part XV (Summary Convictions), are in terms applicable to prosecutions under the Nova Scotia Temperance Act, 1910, counsel may appear before the magistrate and plead guilty for the accused without the personal attendance of the latter in respect of an illegal sale of intoxicating liquor in contravention of the Act.

[*Rex v. Montgomery*, 102 L.T.R. 325, and *Rex v. Thompson*, [1909] 2 K.B. 614, 100 L.T.R. 970, applied; and see to the same effect *Rex v. McDonald* (1913), 21 Can. Cr. Cas. 229 (P.E.I.).]

DECIDED: February 13, 1915.

DEFENDANT was convicted by a Justice of the Peace of an offence against the Nova Scotia Temperance Act on a plea of guilty entered by his solicitor on his behalf in the absence of defendant. A motion at Chambers to set aside the conviction on the ground that a magistrate cannot convict upon the confession of any person other than the accused himself was referred to the full Court by Drysdale, J.

V. J. Paton, K.C., in support of motion.

A. Roberts, K.C., contra.

RITCHIE, J.:—Thompson was charged with an offence against the Nova Scotia Temperance Act. He instructed Mr. Matheson, K.C., to appear, and, if certain technical objections did not prevail, to plead guilty. Mr. Matheson accordingly appeared for Thompson, and, the technical objections being over-ruled, pleaded guilty. Upon this plea of guilty a conviction was made and a warrant issued thereon, under which Thompson was arrested and is now in jail. Mr. Paton, K.C., on his behalf, now moves for an order under the Liberty of the Subject Act. I had some doubt at the argument, but am glad to find that there is good authority for refusing the application, because Thompson is attempting to play a trick on the administration of justice by instructing one counsel to plead guilty for him, and then instructing other counsel to move for his discharge on the ground that the plea of guilty could not be legally made in his absence.

Rex v. Montgomery, 102 L.T.R. 325, is the authority to which I refer. It was the hearing of a summons for driving a motor car at a speed exceeding the limit. The defendant appeared by his solicitor, who pleaded guilty on his behalf and also to a previous conviction. The Justices, on the application of the inspector of police, ordered a warrant to compel the defendant to appear personally. The warrant was granted improperly, so it was held on appeal, because a valid plea of guilty had been made. Lord Alverstone, C.J., said:—

“It was not necessary for the purpose of obtaining a conviction or of proving the previous conviction, for the appellant had pleaded guilty to both.

Bucknill, J., said:—

"The justices were bound to proceed on the appearance and to convict in this case. That was all they had to do on the plea of guilty being made to the offence and to the previous conviction."

Rex v. Thompson, [1909] 2 K.B. 614, 100 L.T.R. 970, is also in point.

It was suggested that *Rex v. Montgomery*, 102 L.T.R. 325, might be distinguished because the defendant wrote a letter admitting his guilt, but that had nothing to do with the ground of the decision. It was held that the defendant could be properly convicted because he had, by his counsel, pleaded guilty, and, this being so, there was no necessity for the personal presence of the defendant. I cannot distinguish between that case and this case, and I hold the conviction good for the same reason, namely, the plea of guilty made by counsel upon the instructions of the defendant. I might deal with the question more fully, but, in view of the high authority which I have quoted, it does not seem necessary to do so. The attempt to trick the magistrate must fail and the application be refused.

DRYSDALE, J.:—The point involved in this application is as to the power of a defendant charged with an offence against the provisions of the Nova Scotia Temperance Act to plead guilty by counsel.

The defendant was charged with a specific offence of sale contrary to the provisions of said Act. By the terms of the Act every offence may be prosecuted in the manner directed by part 15 of the Criminal Code. By sec. 715 of the Code the person against whom the complaint is made shall be admitted to make his full answer by counsel, solicitor or agent on his behalf. It is admitted on this application that the defendant herein engaged and instructed counsel to appear for him before the magistrate on the day and at the time set for hearing of the charge and to plead guilty to the specific charge laid. This was duly done, and thereupon the magistrate convicted defendant in respect of the offence laid. On such conviction defendant has been imprisoned, and he now applies for his liberty under the Liberty of the Subject Act, alleging illegal imprisonment on the ground that he could not be convicted under a plea of guilty by counsel.

I would have thought, apart from authority that where the Code makes a special provision enabling a defendant to make his full answer by counsel in such a case that the defendant would be bound by the acts of counsel within the scope of his authority. No question arises here respecting counsel's authority, as it is admitted counsel was specially retained and instructed to plead guilty before the magistrate.

The application came before me at Chambers, and I was requested to refer it to the full Court in order that our magistrates might have an authoritative declaration on the subject, it being alleged that, by reason of several decisions cited, doubt existed in the minds of the profession on the point. I have been without doubt myself in the matter, and I am pleased to notice the question has been settled in favour of the validity of such a conviction by English authority. I agree with Mr. Justice Ritchie in the opinion he has prepared holding the case of *Rex v. Montgomery, ex parte Long*, 102 L.T.R. 325, conclusive.

The defendant's application must fail.

GRAHAM, E.J., concurred with RITCHIE, J.

LONGLEY, J.:—I have not been able to read the authorities or the statutes, as the rest of my brethren in this case have done, but I have felt the difficulty of differing from the majority and have waived my opinion. It is desirable that the Court should be unanimous in the opinion that without further legislation a barrister may now go before a magistrate without his client and plead guilty to a violation of the Nova Scotia Temperance Act, as will hereafter be the case in Nova Scotia.

Application refused.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE SIR CHARLES TOWNSHEND, C.J., GRAHAM, E.J., AND
LONGLEY, J.

REX v. AIKENS.**1. CERTIORARI (§ II—28)—SUMMARY CONVICTION BAD ON ITS FACE—FILING
SUBSTITUTED CONVICTION.**

On a motion for a writ of certiorari, where the practice is to hear the merits on the motion for the writ, and if granted to include an order quashing the conviction on the return being made, the Court will not permit the filing of a substituted conviction made up by the justice after notice of the certiorari application to remedy the defect of the first formal conviction in not stating any place at which the offence was committed, where the depositions themselves did not shew where the offence was committed, and consequently did not shew territorial jurisdiction of the magistrate.

[Compare *R. v. Oberlander*, 16 Can. Cr. Cas. 244, 15 B.C.R. 134; *R. v. Pickard*, 21 Can. Cr. Cas. 250, 11 D.L.R. 423.]

**2. SUMMARY CONVICTIONS (§ II—20)—LOCALITY OF OFFENCE NOT SHEWN—
TERRITORIAL JURISDICTION.**

Where the depositions already taken before the justice do not supply the defect which makes a summary conviction bad on its face, the justice cannot without the parties being before him and having an opportunity of being heard make up a substituted conviction or amend a defective conviction.

[*Chaney v. Payne*, 1 Q.B. 712, applied.]

DECIDED: February 13, 1915.

APPEAL from the judgment of Ritchie, J., allowing a writ of certiorari and quashing a conviction on return, in respect to a case under the Canada Temperance Act.

W. F. O'Connor, K.C., for appellant.

J. B. Kenny, for respondent.

The judgment of the Court was delivered by

GRAHAM, E.J.:—This is an appeal from the judgment of a Judge allowing a writ of certiorari and quashing a conviction on return in respect to a case under the Canada Temperance Act. The conviction is dated October 8, 1914, and imposed a penalty of \$50 with costs, and directed the forfeiture and destruction of some three barrels of ale and beer found on the premises.

The conviction is properly admitted to be bad. I refer to *The Queen v. Hurlburt*, 27 N.S.R. 62. There is no time or place

stated in respect to which the offence was alleged to have been committed. In fact, the offence is not identified at all. The defendant appears to have been convicted

“of having unlawfully kept intoxicating liquor for sale contrary to the provisions of part 2 of the Canada Temperance Act, then in force in the said municipality of the District of Guysboro,” etc.

The prosecutor appeared and shewed cause on the application for the writ, and the learned Judge, under Crown rule 32, did, as he may do “if he shall think fit,” namely, made it part of the order for the certiorari that the “conviction shall be quashed on return without further order.”

The learned Judge, as well as the Court on appeal, was asked to give effect to the curative sections supposed to be applicable to such a defect: Canada Temperance Act, secs. 146, 147.

It was argued before us that there should have been or now should be an amendment or a refusal to grant the writ because if the conviction was returned to a writ an amendment could be made in it supplying time and place. The difficulty is, that there is no proper proof of the fact which would justify making such an amendment. The depositions do not shew where the offence was committed. It was unusual and, I think, not permitted by the statute to supply facts before the Judge by means of *ex parte* affidavits in an attempt to have an amendment made and the defect cured.

In my opinion, there is nothing to shew that it was an offence within the territorial jurisdiction of the magistrate and there is no evidence to prove such an offence. I refer to *Woodlock v. Dickie*, 6 R. & G. 86. I agree with the learned Judge who heard this application that, if there was any discretion about the matter after a man's property has been taken from him in pursuance of a conviction which was invalid at the time, it would be reason for refusing to exercise that discretion in favour of an order that would now *ex post facto* have the effect of making valid an invalid seizure.

Then at the hearing a conviction was produced by counsel alleged to have been received by him from the Justice and made after he had notice of the application for the writ in which time and place were set forth. Of course, although I never saw a

case of a substituted conviction produced in that way before, there is in some cases a possibility of returning to a writ of certiorari a good substituted conviction.

But this, I think, a magistrate cannot do; he cannot, without the parties being before him and with an opportunity of being heard, make up a substituted conviction, or amend a defective conviction, without having the evidence on which to do so. He must have proper materials on which to amend or cure the defect.

In Seager's Magistrates' Manual, p. 141, it is said:—

“An amended conviction may be made out and returned to the Court under certiorari even after a previous formal conviction has been returned to the clerk of the peace provided such new conviction is according to the truth, and is supported by the facts of the case as proved before the justice.”

And for that *Chaney v. Payne*, 1 Q.B. 712 (Lord Denman, at 722), among other cases, is cited.

The learned counsel for the prosecution contended, in the alternative, that the certiorari should have been refused. But the same reason exists to defeat that contention. The conviction shews a want of jurisdiction on its face.

In my opinion, the appeal should be dismissed and with costs.

Appeal dismissed.

[COURT OF APPEAL FOR BRITISH COLUMBIA.]

BEFORE MACDONALD, C.J.A., AND IRVING, MARTIN, GALLIHER,
AND McPHILLIPS, J.J.A.

REX v. MAY.

1. WITNESSES (§ III—57)—CROWN DISCREDITING ITS OWN WITNESS ON CRIMINAL TRIAL—ADVERSE WITNESS—CANADA EVIDENCE ACT, SEC. 9.

It is ground for ordering a new trial that evidence of a statement made by a Crown witness to the police and taken down in writing on their inquiry into the crime was improperly admitted for the Crown on the witness' failure to identify at the trial as belonging to the accused certain clothing which in his statement to the police he had identified as such, when there had been no finding by the trial Judge, under sec. 9 of the Canada Evidence Act, that the witness was adverse, and that such statement was read by the Crown counsel to the jury and referred to by the trial Judge as being in evidence, although the latter, in his charge, advised the jury not to base a finding on the statement so admitted.

[*Allen v. The King*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, and *Ibrahim v. The King*, [1914] A.C. 616, 63 L.J.P.C. 185, applied; *Greenough v. Eccles*, 5 C.B.N.S. 786; *R. v. William Smith* (1909), 2 Cr. App. R. 86 and 106; *Price v. Manning*, 42 Ch.D. 372, 53 L.J. Ch. 649; *R. v. Mulvihill*, 22 Can. Cr. Cas. 354, 18 D.L.R. 189, 19 B.C.R. 197; *Rice v. Howard*, 16 Q.B.D. 681, 55 L.J.Q.B. 311, referred to.]

2. TRIAL (§ I H—35)—CRIMINAL CASE—COMMENT ON FAILURE OF ACCUSED TO REBUT TESTIMONY—CANADA EVIDENCE ACT.

A direction to the jury on a criminal trial that the accused had failed to account for a particular occurrence, as to which, by reason of the testimony adduced against him, the onus was cast upon him to answer, is not a comment upon the failure of the accused to testify, and does not contravene sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145.

[*R. v. Aho*, 8 Can. Cr. Cas. 453, 11 B.C.R. 114, applied.]

ARGUED: January 21, 1915.

DECIDED: February 9, 1915.

CROWN case reserved by Clement, J., in a murder case.

D. S. Tail, for appellant (prisoner).

Maclean, K.C., for the Crown.

MACDONALD, C.J.:—The questions submitted are as follows:—

(1) Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or any part thereof?

(2) Does my charge to the jury contain any comment on the failure of the accused to testify on his own behalf upon his trial?

The second question should be answered in the negative.

Turning to the record of the proceedings to which the learned Judge has referred us, and upon which the answer to the first question must depend, it will be found that the learned Judge was applied to by Crown counsel for permission to examine the witness Joseph May as an adverse witness under sec. 9 of the Canada Evidence Act, though called on behalf of the Crown. The learned Judge thought that, although there was nothing to lead him to say that the witness had proved adverse, yet in order to decide that question he might receive the evidence of a previous statement alleged to be at variance with an answer the witness had just given in the box.

The propriety of that course appears to me to depend upon the strict legal construction to be placed on the section in question, which is in derogation of the common law. As I read the section, it is made a condition precedent to the admission in evidence of a previous contradictory statement by the witness that he should,

in the opinion of the Court, have proved adverse. Coleridge, C.J., in *Rice v. Howard* (1886), 16 Q.B.D. 681, 55 L.J.Q.B. 311, refused to look at an affidavit which was alleged to contain a statement by the witness in that case at variance with his then testimony for the purpose of deciding the question of the witness's hostility. On appeal to the Queen's Bench Division, the judgment below was sustained on other grounds, and while the Court declined to express a final opinion upon the question now before us for decision, Grove, J., with whom Stevens, J., concurred, nevertheless said:—

“With regard to the first point, as to the rejection of evidence in not looking at the affidavit in order to ascertain if the witness were hostile, the great difficulty seems to be that in order to satisfy the Judge of the witness's hostility counsel would have to put in the very evidence which he wanted to prove his right to use. Upon this point I entertain considerable doubt. It has not been decided whether, when a witness does not appear to be hostile, the Judge can look into other matters to shew that he is hostile.”

Several other cases were referred to during the argument, but in none of them was the precise point now under consideration decided.

It cannot, I think, be doubted that the question of the witness's hostility is one to be decided in the presiding Judge's discretion. If he has exercised that discretion, we cannot, sitting as a Court of Criminal Appeal, review his finding. Here the learned Judge has made it plain that he did not, and as he thought could not, from anything which was at the time before him, decide whether the witness had proved adverse or not. In other words, he made it plain that he had not exercised the discretion vested in him, but determined to admit the alleged contradictory statement before coming to an opinion as to whether the witness had proved adverse or not.

If my view be correct, he admitted a writing which, but for the statute, would be inadmissible, and which under the statute would only be admissible when he had come to the conclusion that the witness had proved adverse. I think, therefore, that the first question must be answered in the affirmative.

I then come to consider the application to the circumstances

of this case of sec. 1019 of the Code. It was contended by counsel for the Crown that even if the writing were improperly admitted, yet the learned Judge by the following instruction sufficiently warned the jury against paying attention thereto:—

“I think you should treat the evidence of that cripple (Joseph May) as only proving this fact: that is, that the trousers were the property of the accused. With regard to the identification of the shirt, I think Mr. Peters is right in saying that his evidence does not tend to prove that the shirt is the shirt of the accused. It simply proves that in the box before you where he was subject to cross-examination he was not prepared to identify the shirt. It was given in evidence—properly, I think, under the Code—that upon another occasion he had said that he did recognize the shirt as being his brother's, but I do not think that should lead you to decide the case upon any finding upon his testimony that the shirt was the shirt of the accused. There is, of course, other evidence, and the weight of that is for you to decide, which goes to substantiate that fact that the shirt which was found there on the trail was in fact the shirt of the accused.”

There is nothing in this to warn the jury that the improperly admitted evidence must be discarded by them. Naturally the learned Judge did not intend so to instruct them, because he told them that the writing was properly admitted. His warning was as to the weight to be attached to the evidence of Joseph May. His instruction did not, in my opinion, go far enough. The jury should have been told that the writing was not properly before them at all, and was not legal evidence of the facts it purported to relate; that they must discard it altogether—not that “I do not think that” (the writing) “should lead you to decide the case upon his testimony that the shirt was the shirt of the accused.”

In the absence of such sufficient warning, it must appear highly improbable that the jury was influenced by the writing: *Ibrahim v. Regem*, [1914] A.C. 616, 83 L.J.P.C. 185.

I think it highly probable that the jury were greatly influenced by the writing in question, and that hence the conviction should be set aside and a new trial ordered.

IRVING, J.A. (dissenting):—The question how far a party is at liberty to discredit his own witness, and in what way, has

been a subject of dispute for many years. Section 9 of ch. 145, R.S.C. 1906, represents sec. 3 of the Imperial Criminal Procedure Act, 1865, 28-29 Vict., ch. 18, which re-enacted sec. 22 of the C.L.P. Act, 1854, 17-18 Vict., ch. 125. The section and the following one are not happily arranged.

Section 3 suggests a doubt that you cannot contradict a witness called by you, even if hostile, unless you get a ruling from the Judge that he is hostile. That is not the law, and was not the law in 1859, when *Greenough v. Eccles*, 5 C.B. (N.S.) 786, was decided. Williams, J., says, at p. 802, that you might contradict him by other evidence relevant to the issue, although you could not discredit him by general evidence of bad character, and he adds:—

“This right to contradict your witness by other evidence relevant to the issue is not only established by authority, but founded on the plainest good sense.”

When the leave to cross-examine has been obtained the 10th section applies.

Now, what took place was this. The police before the trial had obtained from the brother of the prisoner a written statement, and he had also been examined in the police court, and when this brother went into the box he was, at the outset, asked if he previously had not made a different statement to that which he was now making with reference to the way in which he (the prisoner) had spent the afternoon. Mr. Peters took the objection that the witness could not be cross-examined until he had shewn his hostility in open Court and the Judge's leave obtained, and that until such leave had been obtained it was impossible for the previous statement or depositions to be put in.

The learned Judge thought that one way to prove the witness's hostility was to look at the depositions, and he did so, and came to the conclusion the difference between the two statements as to that particular point was immaterial.

The examination proceeded, and the witness was shewn various articles of clothing, which he identified. These, it is not disputed, were the prisoner's. He was then shewn a shirt, and was asked if that was his brother's, to which question he replied at first, “no,” and then said, “I don't know.”

The following then occurred:—

"Q. Now ask him if he remembers telling the police at the police office at Hazelton that that was John May's shirt.

"*Mr. Peters:* Now, my Lord—

"THE COURT: That question so far is all right.

"*Mr. Peters:* Now, he puts the question, does he remember telling that it was so and so.

"THE COURT: Well, perhaps the proper form of the question would be, 'Did you ever at any time make a different statement?'

"(Argument.)

"THE COURT: Well, if it is necessary, I will consider a special case, but I am quite clear. How am I to be guided in considering whether the man is hostile or no? He may keep a most placid demeanour in the box—

"*Mr. Peters:* This man must be acquitted or convicted upon the evidence given in this Court, and not by statements made out of Court.

"THE COURT: No, that is quite true.

"*Mr. Peters:* By getting this evidence in, you are trying this man, not on the evidence given in this Court, but by statements outside.

"THE COURT: No. Surely I can tell the jury that that is not evidence, but I have to be satisfied as to the man's hostility. How am I to be satisfied?

"*Mr. Peters:* By his demeanour.

"THE COURT: No, I don't think so. At all events, I am going to allow this question, so far. Ask him if he made at any time a different statement."

The Crown counsel then put the question, giving time and place, and later on the Crown used the paper in contradicting him and also called two other witnesses to contradict him.

I break off here to repeat what I have already said, on the authority of Williams, J., that it was open to contradict him by these other two witnesses without leave of the Judge. In his address to the jury counsel for the Crown read to them the statement made by the witness to the police.

In the course of his summing up, the learned Judge said:—

"Before speaking of the evidence as presented at the place of the crime, there are two or three matters that perhaps I

had better dispose of. Very strong objection has been made to the reception of the testimony of the brother of the accused. It is a harrowing thing in any criminal trial, particularly in a murder trial, where one brother is called upon to give evidence against another. And in this case, I think you should treat the evidence of that cripple as only proving this fact: that is, that the trousers were the property of the accused." (Let it be noted that the trousers were not referred to in the written statement.) "With regard to his identification of the shirt, I think Mr. Peters is right in saying that his evidence does not tend to prove that the shirt is the shirt of the accused. It simply proves that in the box before you, where he was subject to cross-examination, he was not prepared to identify the shirt. It was given in evidence—properly, I think, under the Code—that upon another occasion he had stated that he did recognize the shirt as being his brother's, but I don't think that should lead you to decide the case upon any finding upon his testimony that the shirt was the shirt of the accused. There is, of course, other evidence, and the weight of that is for you to decide, which goes to substantiate that fact, that the shirt that was found there on the trail was, in fact, the shirt of the accused."

The prisoner was found guilty, and the learned Judge reserved for the opinion of this Court the question: Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or any part thereof?

The question includes (1) the allowance of the cross-examination of the witness; (2) the contradiction of the prisoner's sworn testimony (a) by the production of the statement, and (b) by the proof of the two witnesses; (3) the right of the counsel for the Crown to read it in his address; and (4) the direction of the Judge with reference to the evidence.

In my opinion the cases establish that the proper way to determine the question of the prisoner's hostility is by his conduct in the box, and that Mr. Peter's objection was well taken that the learned Judge was putting the cart before the horse; but, nevertheless, eminent Judges have adopted the same method that the learned Judge adopted in this case, *e.g.*, Mr. Baron Bramwell, in *Amstell v. Alexander* (1867), 16 L.T.N.S. 830, where

that learned Judge thought that although the witness had displayed no animus, he was nevertheless adverse, and allowed the witness to be contradicted after being informed of the different statement. That was a *Nisi Prius* decision, and the case does not seem to have gone further. Again, in the case of *R. v. William Smith* (1909), 2 Cr. App. R. 86 and 106, tried by Lord Coleridge, where a boy (the prisoner's son) gave evidence on the trial at variance with a previous statement made by him to the police, the learned Judge (having become cognizant of the statement) allowed the counsel for the prosecution to treat the boy as hostile, and to refer in his address to the jury to the fact of the statement and the witness's variance from it.

The appeal in this last case, heard before the Lord Chief Justice (Lord Alverstone), Mr. Justice Darling and Mr. Justice Jelf, was dismissed, the judgment saying: "The fact that the boy was allowed to be treated as a hostile witness made no difference to the case." Apparently the contradictory proof by the constables in that case, having regard to the charge, was sufficient to uphold the prosecution.

. Now, let us again turn to the direction to the jury. The Judge referred to the fact that the witness on "another occasion" had identified the shirt, but said that he did not think that should lead the jury to decide the case upon any finding upon the boy's testimony that the shirt was the shirt of the accused, he then goes on to invite the attention of the jury to the other evidence (properly admissible, as I have pointed out), the weight of which he said it was for the jury to decide.

The learned Judge having drawn the distinction between what was said "on another occasion" and in the witness's "testimony," and having expressly told the jury that "his evidence did not tend to prove that the shirt was the shirt of the accused," the case is governed by sec. 1019: see *Ibrahim v. The King*, [1914] A.C. 616, 83 L.J.P.C. 185, at 193, explaining the *Makin Case* [*Makin v. A.-G. of New South Wales*, [1894] A.C. 57], and pointing to the correcting effect of the Judge's charge. The first question I would answer adversely to the prisoner.

With reference to the reading of the witness's statement to the jury, and the argument based on the fact that the statement referred to matters other than the shirt, it would have been better,

I agree, if the learned Judge had told the jury that the statement was not to be regarded as evidence at all, but nevertheless I think the matter was cured by what the Judge said.

As to the second question, I refer to *R. v. Burdell*, 10 Can. Cr. Cas. 365, 11 O.L.R. 440, and *R. v. Guerin* (1909), 14 Can. Cr. Cas. 424, 18 O.L.R. 425, and I would answer that question adversely to the prisoner.

MARTIN, J.A.:—Dealing first with the second question reserved, I need only say that I agree with my brother McPhillips that it should be answered in the negative; it is covered in principle by *R. v. Aho* (1904), 8 Can. Cr. Cas. 453, 11 B.C.R. 114.

The first question should be answered in the affirmative. It raises, clearly, I think, a "question of law" under sec. 1014, viz., as to whether or no the learned Judge was entitled to take the course he did to decide the question of the witness "proving adverse" under sec. 9 of the Canada Evidence Act. I pause here to say that I feel there is much to be said in favour of the contention that was pressed upon us that as a matter of fact the learned Judge did not find that the witness had "proved adverse," but had allowed the question to drift along without giving a definite ruling upon it. If I were forced to come to a decision upon his action, it would be in favour of the accused, because, though others might take the view that though no definite ruling was given yet an adverse one may be gathered from the whole proceedings on the point, nevertheless, to my mind, and with all due respect, we ought not to be placed in such an unsatisfactory position when a man's life is at stake, and I should feel it my duty to give the accused the benefit of an ambiguous situation; no room for uncertainty should have been left in so important a matter.

But, assuming that the fact was found, then the evidence the learned Judge resorted to in order to "prove" that fact was objected to, and if it were not permissible for him to consider it, then there was no ground at all for finding the witness to be "adverse" to the party who called him, and, as a consequence, allowing him to be cross-examined and, in effect, contradicted out of his own mouth by that party, since the learned Judge stated that he did not so find because of the witness's demeanour,

and there was no other evidence. If the learned Judge had reached his conclusion upon demeanour as well as upon evidence he even wrongly admitted, then there would have been no appeal from his decision, as there would have been some evidence, at least, to ground it on: *R. v. Mulvihill* (1914), 19 B.C.R. 197, 209, 18 D.L.R. 189, 22 Can. Cr. Cas. 354; *Rice v. Howard* (1886), 16 Q.B.D. 681, 55 L.J.Q.B. 311, 34 W.R. 532; *Price v. Manning* (1889), 42 Ch.D. 372, 58 L.J. Ch. 649.

While I quite agree with what was said in *Rice v. Howard*, 16 Q.B.D. 631, about the necessity of the trial Judge being free to exercise his discretion in determining these "preliminary or interlocutory questions arising during a trial," and that he should not be hampered in the exercise of that discretion by requiring strict proof of the material upon which he does exercise it, yet that language does not apply, as will be seen later, to a case like the present, where the complaint is that there was no material at all before him upon which he could or did act. It is not a question of strict proof, but of no proof. While all the decisions since the statute was first passed in 1854 (those before are not of real assistance) are not uniform upon the meaning to be given the word "adverse," it having in some cases been apparently treated as meaning "unfavourable" or "opposed in interest," yet the weight of authority is overwhelmingly in favour of its being construed as "shewing a hostile mind," which was the view taken in the leading decision on the point by the Court of Common Pleas, *in banc*, in *Greenough v. Eccles* (1859), 5 C.B.N.S. 786. And not only has no Court of higher authority questioned that view, but it has been independently adopted (without citing it) by the Court of Appeal in *Price v. Manning*, *supra*, over-ruling *Clarke v. Saffery* (1824), Ry. & Mood. 126, wherein all the Lords Justices agree that the witness must be shewn to be "hostile" before he can be cross-examined by the party calling him, and Lord Justice Lopes says, in his judgment, that the Master of the Rolls (Lord Esher) and Lords Justices Lindley and Bowen also took the same view, so the decision is one of great authority, including all the members of the Court of Appeal.

There is a direct authority against the contention that is put forward by the Crown here, and it is to be found in the ruling given by Lord Chief Justice Coleridge, in *Rice v. Howard*, *supra*,

16 Q.B.D. 631, at p. 682, where counsel for a defendant, having called a witness, Howard, found he was giving evidence in conflict with that which he had previously given in an affidavit, and for that reason "asked leave to treat Howard as a hostile witness, and in order to shew he was hostile asked Lord Coleridge, C.J., to look at" said affidavit, but the learned Judge, "being of opinion that there had been nothing in the witness's demeanour, or in the way he had given his evidence, to shew that he was hostile, refused to look at the affidavit." A new trial was moved for in the Queen's Bench Division, on the ground that the affidavit should have been looked at, but the Court refused it, holding that it had no power to review the discretion of the Chief Justice.

It will be observed that this result is precisely in accordance with what I have written above, in that the matter had been decided by the trial Judge upon evidence before him, *viz.*, the demeanour and the way in which the witness had given his evidence, and therefore there was no appeal; and in like manner there would have been none in this case if the learned Judge below had based his decision on that ground. It is further to be noted that in the course of the argument of *Rice v. Howard*, Mr. McCall, as *amicus curiæ*, drew the attention of the Court to a prior decision of Mr. Justice Field in 1878, in *Vestry of St. Leonards, Shoreditch v. Stimson*, where he adopted the same course as Lord Coleridge did, and "refused to look at a letter tendered for the same purpose as the affidavit here." And in the report given in the *Weekly Reporter*, 34 W.R. 532, at p. 533, Grove, J., said, with the concurrence of Stephen, J.:—

"And Mr. McCall referred us to a case which is almost identically this case, except that there it was a letter instead of an affidavit on which it was proposed to cross-examine a witness. There the Judge refused to look at the letter; and the Court held that it was a matter entirely within his discretion. Thus we have one express decision and one strong *dictum*. And that is quite sufficient to bind us."

The proposition now put forward that the witness can be contradicted, as was done at the trial, either by his own inconsistent or other statements before he is found to be adverse, *i.e.*, "hostile," is, in my opinion, not only contrary to the best authority, but to the letter and spirit of the statute, which says that "if the witness

in the opinion of the Court proves adverse, such party may contradict him by other evidence, or, by leave of the Court, may prove that the witness made at other times a statement inconsistent with his present testimony. . . ."

There is a condition of hostility which must first be established before the party is entitled to the consequences of such proof, *i.e.*, the right to contradict or discredit his own witness; this result is stated in the statute to be conditional upon the proof, but what has been done here is to invoke the consequences to prove the condition, which would be something akin to hanging an accused to prove a murder; in other words, an inversion of the intention of the statute. The matter is clearly put by Williams, J., in *Greenough v. Eccles*, 5 C.B.N.S. 786, at 805, in what he says is the "reasonable and indeed necessary" construction of the statute:—

"The section requires the Judge to form an opinion that the witness is adverse before the right to contradict or prove that he has made inconsistent statements is to be allowed to operate."

Willes, J., agreed "entirely" with Williams, J., and Cockburn, C.J., did not assent.

I am therefore of the opinion, following these three direct decisions upon the point, that it was not open to the learned trial Judge in the case at bar to have permitted the witness to be contradicted in advance by his own statement either to enable the Judge to form an opinion upon his hostile mind or for counsel to discredit him; in the circumstances, the failure to prove the witness to be adverse prevented his statement (*ex. B*) being admitted as evidence for any purpose.

In coming to this conclusion I do not wish it to be understood that in my opinion the trial Judge is necessarily restricted to the demeanour of the witness or the way he gives evidence in determining this preliminary question of hostility. He may be assisted to that end by questioning the witness, or allowing him to be questioned by counsel. It might be, *e.g.*, that in answer to the Judge the witness might make such admissions of previous antagonistic or revengeful utterances against an opposite party as would establish the existence of a hostile mind; and said utterances might be proved against him if not admitted.

It follows from the foregoing that in my opinion there must be a new trial, because the statement, ex. B, was "improperly admitted" as evidence for any purpose against the accused, and it is clear to me that by such admission "some substantial wrong or miscarriage was thereby occasioned on the trial," within the meaning of sec. 1019 of the Criminal Code. It not only "*may* have influenced the verdict of the jury and caused the accused substantial wrong," as the majority of the Supreme Court of Canada held to be sufficient to grant a new trial in *Allen v. The King*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, at 341, 363, but it must inevitably have done so in the circumstances before us: cf. *R. v. Davis* (1914), 19 B.C.R. 50, at 64, 22 Can. Cr. Cas. 431, 16 D.L.R. 149. It may be that the result would have been different if the learned Judge, after allowing the statement complained of to be "given in evidence," as he states (at p. 131 of the case), and read to the jury, had warned the jury to disregard it, not only as pertaining to the red shirt but otherwise, but instead of so doing he treated it as being an element in the weight of evidence before them for certain purposes at least, whereas it was not admissible at all.

In the case of a confession wrongly admitted, it was held by this Court, in *R. v. Sonyer* (1898), 2 Can. Cr. Cas. 501, that even a warning is not sufficient, but that the jury should be discharged and a new one impanelled; though, according to the late decision of the Privy Council in *Ibrahim v. Regem*, [1914] A.C. 616, 83 L.J.P.C. 185, which my brother Gallihier has kindly called my attention to, it would appear that this course need not always be taken, their Lordships (after pointing out the difference between their duty and that of "a statutory Court of criminal review") saying (83 L.J.P.C., at p. 194), "the rule can hardly be considered to be settled . . .," and the result has varied in different circumstances.

In considering the cases on the point the statutes on which they were decided must be closely scanned, because an apparently slight change from the language employed in our sec. 1019 may have grave results.

GALLIHER, J.A.:—The case reserved for the opinion of this Court is:—

(1) Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or in any part thereof?

(2) Does my charge to the jury contain any comment on the failure of the accused to testify on his own behalf upon his trial?

When the whole of the Judge's charge is read as it relates to the second point, I am quite clear that this question should be answered in the negative.

The error in law complained of in the first question reserved is that in the examination-in-chief of Joseph May, a brother of the accused, called on behalf of the Crown, the learned trial Judge permitted Crown counsel to cross-examine him with regard to a previous statement made by him which was in writing, and which statement was read to the jury, and also in permitting other witnesses to be called to prove such statement.

Section 9 of the Canada Evidence Act, R.S.C: 1906, ch. 145, governs in this case.

That section is as follows:—

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the Court, proves adverse, such party may contradict him by other evidence, or, by leave of the Court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement."

In the present case we are concerned only with the second alternative in that section: "or by leave of the Court may prove that the witness made at other times a statement inconsistent with his present testimony."

Is it a condition precedent that before the Court permits this course to be taken the witness shall in the opinion of the Court prove adverse?

I think it is, although I confess it is not clear to me why the words "by leave of the Court" are placed in this clause.

The principal test as to whether a witness is adverse or not is that of demeanour in the box, but there may be cases, such as here, where the witness speaks through an interpreter, and it is

impossible to detect from his demeanour whether he is adverse or not.

This seems to have been the predicament the learned trial Judge found himself in, and he permitted the written statement of the witness to be put in, the witness to be examined thereon, and evidence adduced to prove the statement before finding (and in fact he made no specific finding) that the witness was adverse.

A perusal of the English cases shews a considerable divergence of opinion as to the method to be pursued in such a case, but I find none of them which goes so far as to uphold the course pursued here.

I do not go so far as to say that the Judge at the trial may not satisfy himself in some way without having the whole statement go before the jury that the witness is adverse because he has made a contradictory statement at another time; in fact, I am of opinion that a witness may be found adverse by reason of his making such contradictory statement, although his demeanour in the box does not disclose the fact. However, be that as it may, the course pursued here, in my opinion, amounts to a wrongful admission of evidence.

This brings us to a consideration of sec. 1019 of the Code.

Did the admission of the evidence and the reading of the whole statement to the jury occasion a substantial wrong or miscarriage of justice?

In the recent case of *Ibrahim v. Regem*, [1914] A.C. 616, 83 L.J.P.C. 185, Lord Sumner, delivering the judgment of their Lordships of the Privy Council, says, at p. 194:—

“In England, where the trial Judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal, under the similar words of the Criminal Appeal Act, 1907, sec. 4, may refuse to interfere if it thinks that the jury, giving heed to that warning, would have returned the same verdict. . . . Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction if it thinks that the jury may have been influenced by it, even though without it there was evidence sufficient to warrant a conviction: *Rex v. Fisher* (1909), 79 L.J.K.B. 187, [1910] 1 K.B. 149.”

A nice distinction seems to be drawn here in cases where the trial Judge has warned the jury not to act upon the objectionable evidence, and where the jury are not so warned.

We have, therefore, to consider under which of these two classes the case at bar falls.

The learned trial Judge instructed the jury that they were to treat the evidence of the cripple (meaning Joseph May) as only proving that the trousers were the trousers of the accused, and, with regard to the shirt, that what was given in evidence of a previous statement that he recognized the shirt as the shirt of the accused, should not lead them to decide the case upon any findings on Joseph May's testimony.

The learned trial Judge by this probably intended that the jury should have excluded from their minds as evidence the whole of the written statement put in in Joseph May's testimony, but I think he fell short in that respect by not specifically charging the jury to entirely disregard the written statement as proof of any material fact in the issue.

I feel all the stronger in this regard by reason of the fact that the written statement which counsel for the Crown read to the jury in addressing them contains a statement that the accused when he came home on the night of the murder had on no shirt, no hat, just underclothes, pants and boots.

That condition would fit in with the fact that what was said to be the coat, hat and shirt of the accused were found at the scene of the murder.

Joseph May was questioned as to whether he had not described to the police how the accused was dressed when he returned that night, and denied that he had.

As to this condition, there was, as I view it, no sufficient warning to the jury to disregard it, and as it was something very likely to impress itself on the minds of the jury and to influence them, I would answer the question in the affirmative and grant a new trial.

McPHILLIPS, J.A.:—The case reserved calls for answers to the following questions:—

(1) Was there error in law in the course pursued at the trial in reference to the testimony of Joseph May or any part thereof?

(2) Does the charge to the jury contain any comment on the failure of the accused to testify in his own behalf upon his trial?

Answering the second question first—my opinion is that the learned trial Judge did not comment on the failure of the accused to testify. Therefore my answer to question two is in the negative: *Rex v. Aho* (1904), 8 Can. Cr. Cas. 453, 11 B.C.R. 114.

In my opinion, however, question number one must be answered in the affirmative.

Firstly, in my opinion the learned trial Judge did not hold that the witness Joseph May was a hostile witness to admit of the production of extraneous evidence to contradict him, but, if I should be in error in this, the admission of the written statement to establish hostility was error in law on the part of the learned trial Judge. There should have been other evidence upon which the learned trial Judge could have proceeded in arriving at the conclusion that the witness was adverse; and, no such evidence being present, in my opinion there was no exercise of a proper judicial discretion and something was done not in accordance with the law: *Rice v. Howard* (1886), 16 Q.B.D. 681, 55 L.J.Q.B. 311; *Price v. Manning* (1889), 42 Ch.D. 372, 58 L.J.Ch. (C.A.) 649; *Wright v. Willcox* (1850), 19 L.J.C.P. 333; *Rex v. Crippen* (1911), 80 L.J.K.B. 290, at p. 293.

Secondly, the written statement of the witness Joseph May was improperly admitted in evidence. It was inadmissible evidence as against the accused, and was used against him.

This is clear, and cannot, in my opinion, be gainsaid (*Dibble v. The King* (1908), 1 Cr. App. R. 155, is high authority) that the contents of a previous statement to contradict and to discredit a witness are not evidence against the prisoner; and, in that case, there was present that which is absent here—the caution to the jury against putting any reliance on the statement, as it was not evidence against the accused. And, notwithstanding this caution, Lord Alverstone, C.J., in giving the judgment of the Court of Criminal Appeal (1 Cr. App. R., at p. 157), said:—

“The statements of Williams and White were evidence against the latter, but not against Dibble, and it is difficult to doubt that the jury were prejudiced against Dibble by that evidence. Even the fair summing up and grave caution of the Recorder to the jury could not prevent that from

happening. . . . The unfortunate admission of Williams' and White's statements, unavoidable as it was, may have prejudiced the jury: it was impossible to believe that they had no effect on their minds; it was impossible to discover whether in their absence the jury would have considered Dibble's guilt to be proved."

In the reserved case it is stated that counsel for the Crown read the statement to the jury, and the learned trial Judge referred to the statement in his charge to the jury in the following terms:—

"It" (referring to the statement) "was given in evidence—properly, I think, under the Code—that upon another occasion he" (referring to the witness Joseph May) "had stated that he did recognize the shirt as being his brother's, but I don't think that should lead you to decide the case upon any finding upon his testimony that the shirt was the shirt of the accused. There is, of course, other evidence, and the weight of that is for you to decide, which goes to substantiate that fact that the shirt that was found there on the trail was in fact the shirt of the accused."

Upon the argument the learned counsel for the Crown frankly stated that the statement was a "crucial statement," but contended that it was not admitted in evidence, but only used to discredit Joseph May's story in the box and to contradict him. With all deference to the able argument advanced to establish this contention—and that no error in law occurred at the trial—I am impelled to say and to hold that the statement was admitted, and improperly admitted, in evidence.

In the consideration of all criminal appeals undoubtedly sec. 1019 of the Criminal Code is to be borne in mind, but in the present case exactly that which is provided against occurred; that is, a substantial wrong was done the accused on the trial.

In the result the inadmissible evidence may have influenced and prejudiced the jury, bringing about a miscarriage of justice which is to be relieved against.

It therefore follows that, in my opinion, the appeal must be allowed, the conviction quashed, and a new trial directed for the foregoing reasons: *Allen v. The King* (1911), 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, at 341.

New trial ordered; IRVING, J.A., dissenting.

[SUPREME COURT OF ONTARIO.]

HIGH COURT DIVISION.

BEFORE MIDDLETON, J.

REX v. CANADIAN PACIFIC R. CO.**1. CONSTITUTIONAL LAW (§ 11 A 3—200)—RAILWAY COMPANIES—SMOKE REGULATION—MUNICIPAL BY-LAWS OR COMMISSION CONTROL.**

The provisions of order number 5678 of the Railway Commission, Can., for the regulation of the discharge of smoke from locomotives supersedes, as to railway engines operated by a railway subject to federal legislative control, the provisions of a smoke by-law passed by a municipality under provincial authority.

[*C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C. 367, distinguished.]

DECIDED: December 28, 1914.

MOTION by the railway company to quash two convictions under a smoke by-law of the City of Ottawa.

I. F. Hellmuth, K.C., for the defendant company.

J. T. White, for the prosecutor.

MIDDLETON, J.:— Under a municipal by-law of the City of Ottawa, No. 3393, sec. 12, certain provision is made for the prevention of a nuisance by smoke emission. The defendant company, in the operation of its railway, discharged smoke from its locomotive in its roundhouse at the city of Ottawa; and, if the defendant company is subject to the operation of the by-law in question, the magistrate could convict upon the evidence before him.

But I am of opinion that the defendant company in its operation is not subject to the municipal by-law, but is subject to the regulations of the Dominion Railway Board. That Board, by its order number 5678, the validity of which is in no way attacked, regulates the discharge from locomotive engines with a view of preventing unnecessary and unreasonable emission therefrom, and the consequent fouling of the atmosphere. This regulation does not differ widely from the by-law in question.

The Dominion authorities having undertaken to pass regula-

tions dealing with this question, the jurisdiction of the municipality, if it ever had any, is, I think, ousted. So long as the railway company complies with the direction of the Board, the municipality cannot interfere. For a violation of the Board's directions, the appropriate prosecution must follow.

This is, I think, something incident to the operation of the railway, and forms part of the railway legislation, over which the Dominion alone has control, and it cannot be regarded as mere municipal legislation, within the jurisdiction of the Province. That which was held to be within the Provincial jurisdiction in *Canadian Pacific R. Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, was something quite apart from the operation of the road over which the Dominion had jurisdiction. See *Madden v. Nelson and Fort Sheppard R. Co.*, [1899] A.C. 626; *Canadian Pacific R. Co. v. The King* (1907), 39 Can. S.C.R. 476.

The convictions will, therefore, be quashed; under the circumstances without costs and with protection to the magistrate.

Conviction quashed.

[SUPREME COURT OF ALBERTA.]

BEFORE SCOTT, BECK, STUART, AND WALSH, JJ.

REX v. McCLAIN.

1. CRIMINAL LAW (§ II A—31)—PRELIMINARY INQUIRY—CAPTION TO DEPOSITIONS.

It is not an objection that depositions taken in a preliminary inquiry have no formal caption to indicate the case in which they were taken if such depositions returned into the superior Court are physically attached to a document called the "statement of accused," which sets forth the charge and date of hearing and that the charge was read to the accused and that on being given the statutory warning he made no statement, and it further appears from the depositions themselves that they refer to the charge so recited in the "statement of accused."

2. APPEAL (§ I C—25)—CRIMINAL CASE—QUESTION OF LAW—CORROBORATIVE EVIDENCE.

Where corroborative evidence is not required by statute and there is nothing to shew that the Judge trying a criminal charge without a jury had misdirected himself upon a matter of law, it is irregular to reserve for the Court of Appeal the question whether the evidence disclosed sufficient corroboration of an accomplice's evidence, such not being in such circumstances a "question of law" within Cr. Code sec. 1014.

[*R. v. Bechtel*, 19 Can. Cr. Cas. 423, and 21 Can. Cr. Cas. 40; 5 D.L.R. 497 and 9 D.L.R. 552, referred to.]

3. THEFT (§ I—12)—RECENT POSSESSION—EVIDENCE.

On a charge of theft the presumption arising from recent possession of the stolen goods may be applied against the accused in conjunction with direct evidence.

4. WITNESSES (§ I B—15)—COMPETENCY—ONE OF TWO JOINTLY CHARGED PLEADING GUILTY.

Where two persons were jointly charged with theft and one pleaded guilty and the other not guilty, the former may be called as a witness against the latter although sentence had not yet been passed upon the plea of guilt; in such a matter it must be left to the discretion of the presiding Judge to decide what is the fairest and most convenient course to pursue in the particular case, and whether there should be an adjournment of the trial or an immediate sentence of the accomplice; and where he is holding the trial without a jury, it is not error for the Judge to take cognizance of the accomplice's evidence before sentencing him, although in receiving the testimony the Judge expressed a view favouring a different course had there been a jury.

[*Winsor v. The Queen*, L.R. 1 Q.B. 390, and *R. v. Payne*, L.R. 1 C.C.R. 349, discussed.]

5. CRIMINAL LAW (§ II B—47)—NAMES OF CROWN WITNESSES—FORMAL CHARGE WHERE NO GRAND JURY SYSTEM.

The context of secs. 874 to 876 of the Criminal Code makes sec. 876 (endorsing names of witnesses on bill of indictment) inapplicable to proceedings by formal charge in a province where there is no grand jury system, notwithstanding the extended meaning given to the word "indictment" by Cr. Code sec. 2 (16); effect is to be given to the latter only in the event of the context being consistent therewith.

6. CRIMINAL LAW (§ II B—47)—DISCLOSING TO ACCUSED BEFORE TRIAL NAMES OF WITNESSES AGAINST HIM.

While no definite rule is laid down in the Criminal Code to compel the endorsing of the names of witnesses for the prosecution on a formal charge laid by the agent of the Attorney-General under Cr. Code sec. 873A (applicable in Alberta and Saskatchewan), the presiding Judge may give all necessary protection to the accused so that he may have a fair opportunity to defend himself; the name of any additional Crown witness not examined at the preliminary inquiry ought, as a matter of fairness, to be disclosed to the accused—at any rate if he asks for the information.

[*R. v. Gleenslade*, 11 Cox C.C. 412, referred to.]

7. TRIAL (§ I D—21)—CRIMINAL CASE—CROWN WITNESSES AT PRELIMINARY INQUIRY.

If the Crown does not intend to call at the trial a witness whom it called on the preliminary inquiry, such witness should be made available to the defence unless his evidence is unquestionably immaterial. (Dictum by the Court.)

DECIDED: January 26, 1915.

CROWN case reserved by McCarthy, J., on a charge of theft.

F. W. Griffiths, for accused.

James Short, K.C., for the Crown.

The judgment of the Court was delivered by

STUART, J.:—This is a case reserved for the opinion of the Appellate Division by Mr. Justice McCarthy. The accused was

charged jointly with one Mathews with the offence of having stolen a horse and mare, the property of one Brink, on July 1, 1914. The charge was in the usual form and was signed by James Short, as agent of the Attorney-General. When the charge was read to the accused, McClain pleaded not guilty and Mathews pleaded guilty. The learned trial Judge reserved sentence upon Mathews. Afterwards, but before sentence was passed upon Mathews, the trial of McClain was proceeded with, and he elected to be tried without a jury. The trial Judge convicted McClain. The chief evidence against him was that of his accomplice Mathews, who had pleaded guilty, but was awaiting sentence.

At the opening of the trial, counsel for McClain applied to quash the charge or indictment on the ground that there were no proper depositions, as required by sec. 682 of the Code. This objection was reserved, but ultimately over-ruled by the trial Judge.

When Mathews was called to give evidence on behalf of the Crown, and before he was sworn, the following discussion took place:—

“Mr. Griffiths: I wish to invite your Lordship’s attention to the fact that the next witness, Mathews, has pleaded guilty to this same charge, but has not yet been sentenced. For this reason I wish to raise objection to the receipt of the evidence of Mathews until after he has been sentenced.

[Point argued by both Mr. Griffiths and Mr. Short.]

“BY THE COURT: In view of these authorities, Mr. Short, do you still tender the evidence of the witness Mathews?

“Mr. Short: Yes, my Lord.

“BY THE COURT: Well, the responsibility is upon you. I will admit the evidence, subject to Mr. Griffiths’ objection.”

Mathews then gave evidence and other evidence was adduced by the Crown which was intended to corroborate the story of Mathews.

At the close of the prosecution counsel for the accused renewed his former objections, which were all over-ruled. In reference to the testimony of Mathews, the learned trial Judge said:—

“The cases cited by counsel for the accused, I find, do not determine the point. Cockburn, C.J., determined it was a very bad practice this holding out an inducement to the wit-

ness to give evidence in favour of the Crown in the anticipation that the Crown would be lenient with him when moving for sentence in his case. Had there been a jury in this case, I would have been inclined to sustain the objection, but, as there is no jury and as the cases cited by the counsel for the accused do not decide this, I take it upon myself to permit that evidence to go in, exercising my own judgment as to what weight I should give to the evidence of Mathews under the circumstances."

Evidence for the defence was then given, and the accused was convicted and sentenced to 3 years in the penitentiary. Upon the application of counsel for the accused, the learned trial Judge reserved a case for the opinion of this Court upon the following questions:—

1. Should the indictment or charge have been quashed?
2. Does the evidence disclose sufficient corroboration of the evidence of Mathews?
3. Can the presumption arising out of recent possession of stolen property have any bearing on the case when the Crown attempted to make out its case by direct evidence?
4. Was I right in so remanding Mathews for sentence and permitting him to testify against McClain before imposing sentence?
5. Was I right in permitting the Crown to call witnesses who were not called at the preliminary hearing or whose names were not endorsed upon the charge?
6. Upon the above grounds or any of them should the conviction be quashed?

I think the first question should be answered in the negative. In the case reserved it is stated that "it was admitted by the Crown prosecutor that the charge was not ordered by a Judge or agent of the Attorney-General, and that objection to the same was taken before election or plea." In view of the undoubted fact that Mr. Short did, in fact, sign a charge in the usual way, a copy of which is in the case submitted and the actual original of which was shewn to us as part of the documents on file, there can be no doubt that there was some misapprehension when the case was prepared with the statement of admission above cited inserted in it. It is clear that what was intended was that there

was no order of a Judge directing the charge to be laid and no special direction or order by the Attorney-General.

The contention made by counsel for the accused was that, owing to certain alleged defects in the depositions taken upon the preliminary inquiry, the case should be treated upon the footing that there were no depositions and no preliminary inquiry at all, and that, therefore, in the absence of such a proper preliminary hearing, the agent of the Attorney-General had no power under sec. 873A of the Criminal Code to prefer any charge against the accused.

If the premises of the learned counsel were correct, it would be necessary for us to consider one of the questions raised in the cases in *Re Criminal Code*, 16 Can. Cr. Cas. 459, and in *Rex v. Duff* (No. 2), 15 Can. Cr. Cas. 454.

In my opinion, however, it is not necessary to consider that important question, because it seems clear that there was a proper preliminary inquiry and proper depositions.

The only criticism made of the form in which the depositions appear was that there did not appear any separate caption to the page upon which the evidence commenced. There is, first, a document headed "Statement of the Accused," which sets forth the charge against the accused, the date of the hearing, the fact that the charge was read to the accused, that the statutory warning was given, and that the accused made no statement. This document is signed by the Justice of the Peace, and then follows, physically attached to the first document by a pin, six pages of foolscap, upon which what purports to be the evidence of the witness called is written down in pen and ink, and each page purports to be signed by the witness and by the same Justice of the Peace who signed the first document. A perusal of this evidence shews that the witnesses were referring to the charge referred to in the first document. There is also before us the information and complaint not attached to the other documents, but plainly referring to the same charge. It is true there is no record of the committal for trial, but, in my opinion, there is sufficient to shew that the accused did, in fact, have the advantage of a preliminary inquiry. Inasmuch, therefore, as it is only upon the ground that an agent of the Attorney-General cannot prefer a charge without there having been a preliminary inquiry that the conten-

tion is made that the charge should have been quashed, I do not think that some slight defects in the form in which the magistrate returned the depositions to the proper Court can be taken advantage of to uphold such an argument.

With regard to the second question, I am of opinion that it does not raise any point of law at all, and that no question is properly reserved for our opinion. This Court has already decided in *Rex v. Bechtel*, 5 D.L.R. 497, 19 Can. Cr. Cas. 423; 9 D.L.R. 552, 21 Can. Cr. Cas. 40, that a jury not only may, but ought to, be told that, while they ought not to convict on the uncorroborated testimony of an accomplice, they are strictly in law at liberty to do so if they see fit.

Where corroborative evidence is required by the Code, it is the duty of the trial Judge to instruct the jury as to what part of the evidence, if any, bears that character, and if he mis-instructs them, there is no doubt the matter can be reviewed on a reserved case. And so also, where there is no jury, if the Judge has obviously treated as corroborative evidence something which is not such within the meaning of the Code, it would probably be fatal to the conviction.

But in the present instance corroborative evidence was not strictly necessary at all. The learned trial Judge indicated, when convicting the accused, that he considered certain things corroborative of the evidence of Mathews, the accomplice. Whether those things would or would not have come within the meaning of the term "corroborative evidence" had such evidence been required by law might have been in such a case a legitimate matter for argument; but I am unable to see how, when the trial Judge was acting entirely as a jury and could not be said to have been directing himself upon a matter of law at all, it can be open to this Court to question the propriety of his views on the matter. The second question, therefore, should not, in my opinion, be answered otherwise than by saying that it does not raise a point of law which can be reserved.

The third question should, in my opinion, be answered in the affirmative. The Crown is entitled to make out its case both by asking the Court to apply the principle of recent possession and by other more direct evidence of the theft. There is no reason, that I can discern, why both means should not be adopted

at the same time. No authority was quoted for the opposite view and the matter appears to me to be too plain for argument.

The fourth question, treating it as a pure matter of law, should, I think, also be answered in the affirmative. By this I mean that it does not appear to me that any error in law was committed by the learned trial Judge in hearing the evidence of the confessed accomplice, Mathews, before sentence had been passed upon him.

The simple question involved seems to be this: Was he at the time he was called by the Crown a competent or an incompetent witness? No serious attempt was made to shew that he was not a competent witness. It is clear that he was, and, being so, the Crown had a right to call him. The observations of Cockburn, C.J., in *Winsor v. The Queen*, L.R. 1 Q.B. 390, as explained by him in *Reg. v. Payne*, L.R. 1 C.C.R. 349, 354, were only directed to the question of convenience and fairness. It is obvious that in such a matter it must be left to the discretion of the presiding Judge to decide what in each particular case is the fairest and most convenient course to pursue. The learned trial Judge here did, indeed, say that had there been a jury he would have been inclined to take a different course. It was argued that this amounted to an exercise of his discretion against the propriety of admitting the evidence of Mathews, and yet he, in fact, admitted it and acted upon it.

In my opinion, what he said amounted to nothing more than saying that in other circumstances, viz., if there had been a jury, he *might* have guided the course of the trial, either by adjournment or by an immediate passing of sentence upon Mathews before he testified, in a different way from that he thought fit to adopt when sitting alone. Before passing sentence upon Mathews he felt the need of learning more about the case, and this he expected to do upon the trial of McClain. He no doubt felt, and quite properly, that he could make all due allowance for the position in which Mathews stood when he came to weigh that person's testimony. While, therefore, there may be circumstances in which the presiding Judge ought to regard the views of Cockburn, C.J., in *Winsor v. Reg.*, L.R. 1 Q.B. 390, as a proper guide, it is impossible to say that there is any fixed rule of law applicable to the matter which must be followed in all cases.

Question five should be answered in the affirmative. Section 876 of the Code says that "the name of every witness examined or intended to be examined shall be endorsed on the bill of indictment; and the foreman of the grand jury or any member of the grand jury so acting for him shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment." This section is one of five sections, 874 to 878 inclusive, which are under the caption "proceedings before the Grand Jury." It is true that by sec. 2 (16) of the Code, being the interpretation section, the word "indictment" includes "any formal charge under 873A" but this is subject to the qualification at the beginning of the main section "unless the context otherwise requires."

In my opinion, it is obvious that, owing to the context, it is not possible to treat sec. 876 as applying to a charge under 873A signed by the agent of the Attorney-General. It is clear that the words, "every witness examined or intended to be examined," refer to the examination before the grand jury, not to examination at the trial before the petty jury. The agent of the Attorney-General who signs a charge under sec. 873A does not examine witnesses like a grand jury. Very frequently I have seen attempts made to press the analogy between the agent of the Attorney-General in Alberta and Saskatchewan and the Grand Jury in other provinces, but it is clearly impossible to extend the analogy so far as to make sec. 876 applicable in Alberta. By its very terms the section is incapable of application.

As a measure of fairness and justice, the Crown ought to furnish to the accused in some form the names of the witnesses intended to be called in chief in support of the Crown's case. As a general rule this information is sufficiently given by the depositions taken on the preliminary hearing. Any witness there examined should be made available to the defence if the Crown does not intend to call him unless his evidence is unquestionably immaterial. And the name of any additional witness not examined at the preliminary inquiry which the Crown proposes to call in chief ought, as a matter of fairness, at a reasonable early period, at any rate if asked for, to be made known to the accused. But there is no law laying down any definite rule in this matter, which must be left to the presiding Judge to deal with in such

a way as to give all necessary protection to the accused and to give him a fair opportunity to defend himself against the charge. See *Rex v. Gleenslade*, 11 Cox 412, 413, note.

The result is that the conviction is affirmed.

Conviction affirmed.

[COURT OF KING'S BENCH, MANITOBA.]

BEFORE GALT, J.

REX v. RABINOVITCH AND CLINGMAN.

1. SECRET COMMISSION (§ I—10)—FALSE STATEMENT IN WRITING—COLLUSIVE FIXING OF PRICE BY EMPLOYEE.

Where by collusion between the seller and the buyer's employee whose duty it was to fix the prices at which the buyer would purchase, such prices were systematically doubled or trebled over the ordinary rates, and these prices were re-stated in the seller's account copied from the buyer's order form, and the employee so dishonestly crediting fictitious prices was receiving cash presents from the seller as a share or bribe for the continuance of the fraud, charges under the Secret Commissions Act, Can. 1909, are sustainable against the seller, not only in respect of the corrupt gifts, but for issuing a statement of account false and erroneous in a material particular intended to mislead, and also in respect of the fraudulent order form as to his privy to the use of same to deceive the buyer.

2. WITNESSES (§ III—58)—CORROBORATIVE TESTIMONY—PRIOR FACT OTHERWISE IRRELEVANT—ADMISSIBILITY.

Facts which tend to render more probable the truth of a witness' testimony on any material point are admissible in corroboration thereof although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated.

[*Wilcox v. Gotfrey*, 26 L.T.N.S. 481, applied.]

DECIDED: February 11, 1915.

SPEEDY trial without a jury of the two defendants jointly on their election, under Cr. Code, sec. 827, against a jury trial. Four offences were charged under the Secret Commissions Act, Can. 1909.

C. P. Fullerton, K.C., for the Crown.

W. H. Hastings, for the prisoners.

GALT, J.:—The indictment in this case charges Rabinovitch and Clingman jointly with four offences under the Secret Commissions Act, 1909, being 8 & 9 Edw. VII. ch. 33.

The title of the Act is, "An Act to prevent the payment or acceptance of illicit or secret commissions and other like practices." The word "agent" in the Act is defined to mean, "any person employed by, or acting for, another, and includes a person serving under the Crown or under any municipal or other corporation." The word "principal" includes an employer.

Under sec. 3,

"Every one is guilty of an offence, and liable, upon conviction on indictment, to two years' imprisonment, or to a fine not exceeding two thousand five hundred dollars, or to both, and, upon summary conviction, to imprisonment for six months, with or without hard labour, or to a fine not exceeding one hundred dollars, or to both, who,

"(b) corruptly gives or agrees to give, or offers any gift or consideration, to any agent as an inducement or reward, or consideration to such agent, for doing or forbearing to do, or for having, after the passing of this Act, done or forborne to do, any act relating to his principal's affairs or business, or for shewing or forbearing to shew favour or disfavour to any person with relation to his principal's affairs or business; or

"(c) knowingly gives to any agent, or, being an agent, knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which, to his knowledge, is intended to mislead the principal;

"(d) every person who is a party or knowingly privy to any offence under this Act shall be guilty of such offence, and shall be liable upon conviction to the punishment hereinbefore provided for by this section."

Section 4 of the Act provides that it shall be read as if its provisions formed part of the Criminal Code.

The first count of the indictment charges that the accused, about June 16, 1914, at the city of Winnipeg, knowingly gave to George Craig Lockhart or to Hugh S. McCook, both agents of the J. H. Ashdown Hardware Co., Ltd., an account which contained a statement which was false and erroneous in a material particular and was intended to mislead the said company.

The second count charges that on or about June 18, 1914, at

Winnipeg aforesaid, the accused were knowingly privy to one Hugh S. McCook, an agent of the J. H. Ashdown Hardware Co., Ltd., knowingly using, with intent to deceive the said company, the principal of said McCook, a receipt or order form, being a document in respect of which said company was interested, which said receipt or order contained statements which were false and erroneous in a material particular, and which said receipt or order form was, with the knowledge of said McCook, intended to mislead said company.

The third count charges that the accused, in the month of June, 1914, at Winnipeg aforesaid, corruptly gave a gift or consideration to Hugh S. McCook, an agent of the J. H. Ashdown Hardware Co., Ltd., as an inducement or reward or consideration to such agent for shewing favour to them, the said accused, with relation to the affairs or business of said J. H. Ashdown Hardware Co., Ltd., or for having done an act relating to the affairs or business of said company.

The fourth count charges that the accused, on or about July 13, 1914, at Winnipeg aforesaid, knowingly gave to George Craig Lockhart, an agent of the J. H. Ashdown Hardware Co., Ltd., an account in respect of which the said company, the principal of said Lockhart, was interested, which account contained a statement which was false and erroneous in a material particular, and which, to the knowledge of the accused, was intended to mislead the said company.

The Ashdown Company are wholesale and retail merchants in Winnipeg, and have conducted business here for many years. The present transaction occurred in their wholesale business. In re-shipping their goods they require boxes of various sizes, and it has been their custom to purchase second-hand empty boxes from various persons and firms. These boxes, for the most part, were obtained from wholesale liquor dealers and hotels, and also from wholesale tobacco dealers and grocery dealers; but far the larger proportion of the boxes required and supplied were so-called liquor boxes. The prices charged by the original vendors of these second-hand liquor boxes was shewn to be \$1 per dozen, if the boxes were called for, or \$1.25 if they were delivered to the purchaser. The usual price charged for other boxes, for instance, biscuit boxes, chocolate boxes, tobacco boxes, cigarette boxes,

etc., was 25 cents apiece. Occasionally the prices charged would be 35 cents, 40 cents, 45 cents, and even 50 cents per box; but that appears to have been unusual, and probably only applied to large packing cases required at the time for some special purpose.

The Ashdown Company had dealt with Rabinovitch continuously since the year 1908. In supplying these boxes to the Ashdown Company, Rabinovitch, and later on both Rabinovitch and Clingman, would have to procure and pay for the boxes, and they would naturally expect to make a reasonable profit on each resale to the Ashdown Company.

Fred L. Chandler, manager of the Marshall Wells Co., was called as a witness for the Crown. He testified that his company did the same class of business as the Ashdown Company; that they purchased similar empty boxes from a junk dealer named Schragge, and that they paid \$1 per dozen for liquor boxes, if called for, or \$1.25 if delivered by Schragge.

The following figures illustrate the prices paid by the Ashdown Company during their earlier dealings with Rabinovitch:—

Aug. 24, 1908.	5½ doz. grocery boxes, at 10c.	\$ 6.60
Sept. 4, 1908.	32 boxes, at 30c.	9.60
Sept. 16, 1908.	10 boxes, at 30c.	3.00
	42 boxes, at 10c.	4.20
Sept. 9, 1908.	5½ doz. boxes, at 10c.	6.60
Sept. 23, 1908.	78 boxes, at 10c.	7.80
Sept. 29, 1908.	39 cases, at 10c.	3.90
	8 cases, at 25c.	2.00
Oct. 9, 1908.	95 boxes, at 10c.	9.50
Nov. 20, 1908.	12 boxes, at 35c.	4.20
	15 boxes, at 30c.	4.50
Feb. 26, 1909.	12 boxes, at 45c.	5.40
	5 doz. boxes, at 15c.	9.00
	3 doz. boxes, at 10c.	3.60
	10 boxes, at 40c.	4.00
March 9, 1909.	281 boxes, at 25c.	70.25
	22 boxes, at 40c.	8.80
	7 boxes, at 50c.	3.50
	12 boxes, at 30c.	3.60

So far as I could gather from the evidence, the prices at which these various kinds of second-hand boxes were obtainable from

1908 down to date have been practically the same so far as the general trade in this class of goods was concerned.

In the fall of 1909, Rabinovitch took his brother-in-law Clingman into partnership with him, and they thenceforward carried on business under the name of the Winnipeg Bottle and Metal Exchange. The declaration of partnership was registered on March 18, 1910.

Rabinovitch, who was examined during the course of the trial, appears to be a shrewd young man with ordinary education. Clingman appears to be a dull, uneducated man, older than Rabinovitch, and unable to either read or write. Still Clingman had been engaged in this junk business for some considerable time before he entered into partnership with his brother-in-law, and he was well aware of the ordinary prices at which the goods he dealt in were bought and sold. In fact, he was usually the purchaser of the goods before re-selling to the Ashdown Company. From the date of their partnership the accused had continuous dealings with the Ashdown Company in the supply of second-hand boxes.

The system adopted by the parties was as follows: The Ashdown Company had a head packer, named Hugh Smith McCook, who had been in their employ for the last ten years, assisted by several under-packers. Goods for shipment by the company were packed on the third floor of their warehouse. On the first floor the Ashdown Company employed a receiver of goods named Thorne. Whenever the company required boxes they would notify the accused, and when a consignment of boxes arrived Thorne would count them, without specifying the particular kind, and enter them in a book. But Clingman did not require nor receive any receipt. Thorne would then notify McCook, the head packer, who would send down one of his assistants to get the boxes. The assistant would count them and enter the number of them on a slip of paper, take the boxes up in the elevator to McCook, and hand him the slip. It would then be McCook's duty to make out an order in duplicate, setting forth the date and fixing the charges for the consignment, and send the original to the accused, keeping the carbon copy in an order book.

The accused would render a statement of their account against the Ashdown Company twice a month, usually about the middle

and end of the month. This statement would be a reproduction of the figures which had been fixed by McCook in each of the orders aforesaid. The statement rendered in the middle of any month would usually contain the orders given during the last fortnight of the preceding month, and the statement rendered at the end of the month would include the orders for the first half of that month. Such statements would be taken by one of the accused to McCook at the Ashdown warehouse, to be approved and initialled. It would then be handed back, and on presentation at the office a cheque would be made out and delivered for the amount in favour of the Winnipeg Bottle and Metal Exchange.

In or about the month of May, 1914, the Ashdown Company became suspicious that they were paying too much for their boxes. The fixing of the prices for these boxes had been delegated to McCook for years past, and nobody else in the warehouse seemed to have any accurate knowledge as to what the proper prices should be.

The account referred to in the first count of the indictment is dated June 16, 1914. It was made out by Harry Rabinovitch, and consists of items which had previously been entered in various orders given by McCook to Rabinovitch, commencing June 2nd and ending June 15th. A glance at this account indicates at once a very large increase in the prices paid for boxes over the amounts which had previously been charged by Rabinovitch in 1908, and which were shewn, by the evidence of several witnesses, to be the ordinary prices for such goods in Winnipeg ever since that date. A few lots were charged for at the rate of 15 cents apiece, but a large number at prices ranging from 50 cents up to 80 cents. In the result 490 second-hand boxes were received by the Ashdown Company from the accused and were charged for at an average price of 57 cents apiece. Clingman, who had delivered the boxes, took this account, amounting in all to \$280, to the Ashdown Company, procured McCook's initialling, and then received a cheque for the amount.

The next account rendered by the accused under the name of the Winnipeg Bottle and Metal Exchange is dated July 13. It covers items running from June 17 to June 30, amounting to \$264, and forms the basis of the fourth count of the indictment. This account also was made out by Rabinovitch. The amounts

charged for the various classes of boxes is pretty much the same as appeared in the previous account, that is to say, it varies from 15 cents apiece per box (in very few instances) to 40 cents, 50 cents, 60 cents, and 80 cents, the boxes on the average netting $47\frac{1}{2}$ cents apiece. Of these 556 boxes, 437 are said to have been liquor boxes, the price of which was shewn to be certainly not more than \$1.50 per dozen.

Clingman, according to his own story, was absolutely ignorant of everything that took place in connection with these transactions. He says he could not read and did not know the prices that were being charged, and although he was entitled to one-half the profits of the business ever since the partnership commenced, he never made any effort to ascertain what was due to him, but merely drew out a little money from time to time to live upon. He must have had some practical knowledge of figures, for he was the partner who conducted most of the buying up of boxes, etc. He also did most of the delivering of the goods, and he at least occasionally collected payment for the goods. I cannot believe that he was not well aware of the prices his firm was charging the Ashdown Company for the boxes in question. The line of business pursued by his firm included only a few classes of goods, and it is impossible to believe that he did not frequently discuss with his brother-in-law, Rabinovitch, the prices at which they were selling the goods which he, Clingman, had already bought and paid for. In the case of the account dated June 16 (ex. 3), Clingman himself attended with the account, and got the cheque. He would at least know that his firm were collecting a cheque for \$280 for boxes delivered between the 1st and 15th of June. He also knew the amount shewn by his firm's account dated July 13, 1914, for \$264, as he attended to collect this also.

I am satisfied that if there was any "false or erroneous statement" in either of these accounts Clingman as well as Rabinovitch must be taken to have known it.

The Secret Commissions Act is a reproduction of the Prevention of Corruption Act, 1906, in force in England. I have been unable to find any case decided under either Act which might assist in deciding this case.

The first and fourth counts of the indictment are laid under sec. 3 (c) of the Secret Commissions Act, which is aimed at punish-

ing anyone who knowingly gives to any agent any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal.

The question is, do these accounts, or either of them, contain any false or erroneous statement?

The Oxford New English Dictionary defines the word "false" to mean "erroneous, wrong," "purposely untrue, mendacious."

During the argument of this case I was a good deal impressed with the view that a statement of account by a vendor of goods, embodying merely the same figures as had been fixed by an agent of the purchaser, could not fairly be said to be a false statement, and that for the same reason it would not be erroneous or defective.

In order to properly ascertain to what, if any, extent the accused's accounts were false, in the light of the meaning given to that word by our most authoritative dictionary, it is necessary to revert to the original orders given by McCook which formed the basis of the accused's accounts.

McCook was well aware of the true values of the boxes and the prices which had for years been paid by the Ashdown Company in purchasing them. Upon receipt of any given quantity of boxes—for instance, of 83 boxes on June 4th—it was shewn in evidence that this consignment consisted of 80 liquor boxes and 3 Apollinaris boxes, valued in all at \$8.30; but McCook sub-divides these into five different classes of boxes at prices ranging from 15 cents to 80 cents per box, at a total charge of \$32.10. Manifestly the statements made in that order as drawn up by McCook were false and erroneous within the meaning to be attributed to those terms, and were intended to deceive his principal.

Rabinovitch possessed the same knowledge as McCook had with regard to the proper values to be paid for the boxes. He must have known perfectly well that the prices were "false and erroneous." He willingly adopted McCook's figures and rendered his account to the J. H. Ashdown Hardware Co., Ltd., embodying these false charges, and sent Clingman to collect the money.

Clingman was well acquainted with the prices of the boxes, for he had paid for them himself. It is true he says he cannot read or write, but he at least knew the number of boxes he had

delivered, and he must have known the proper prices chargeable for them by his firm. He took the bill to McCook for initialling and subsequently obtained a cheque for the amount. I think he must be taken to have known perfectly well that the account contained the above false statements.

Precisely the same reasoning applies to the account dated July 13, 1914, which forms the subject of the fourth count of the indictment.

The charge set forth in the second count of the indictment is that the accused, on or about June 18, 1914, were knowingly privy to McCook, agent of the Ashdown Company, knowingly using, with intent to deceive the Ashdown Company, a receipt or order form No. 46173, which said receipt or order contained statements which were false and erroneous in a material particular, etc.

The order in question relates to a delivery of 191 boxes by the accused to the Ashdown Company. This delivery, as shewn by the evidence of George Craig Lockhart, voucher clerk for the Ashdown Company, consisted of 188 liquor cases and 4 Old Chum cases. The value of the liquor cases at proper prices is calculated to be \$19.58, and the 4 Old Chum cases \$1.00, making in all \$20.58. This consignment was expanded by McCook on the company's order form into seven different classes of boxes, ranging at prices of 15 cents, 40 cents, 45 cents, 50 cents, 60 cents, 65 cents and 80 cents, and the amount to be charged was fixed by McCook at \$99.20. Unquestionably this order contained statements which were false and erroneous in material particulars, and was intended to mislead the Ashdown Company.

Rabinovitch, for reasons already given, must be taken to have accepted the order and acted upon it knowingly and with intent to deceive the Ashdown Company.

There was no evidence to connect Clingman with knowledge of the terms of this order. He could not read or write except to a very limited extent, and he would have nothing to do with the preparation of the accounts to be rendered to the Ashdown Company.

The third count of the indictment charges that the accused, in the month of June, 1914, corruptly gave a gift or consideration to Hugh S. McCook, an agent of the J. H. Ashdown Hardware

Co., Ltd., as an inducement or reward or consideration to such agent for shewing favour to them with relation to the affairs or business of the Ashdown Company.

In order to deal intelligently with this charge a few preliminary observations are necessary. Shortly after July, 1914, McCook was arrested in connection with the transactions in question. He pleaded guilty and was let out of custody on suspended sentence. The particular charge laid against him was not put in evidence at this trial, but McCook was called as a witness for the prosecution, and testified that he had been in the employ of the Ashdown Company for about ten years as head packer. He explained the system adopted in purchasing second-hand boxes as above detailed. He had been purchasing boxes from Rabinovitch for about seven years and from both of the accused since the formation of the Winnipeg Bottle and Metal Exchange. McCook states that about three years ago Rabinovitch was with him in the warehouse, and when going away put a ten dollar bill in McCook's pocket. McCook had been examined as a witness at the preliminary hearing, and stated that Rabinovitch handed him \$10 on the occasion in question, but he did not say that Rabinovitch had put it in the witness's pocket. McCook professes that at first he did not know why Rabinovitch gave him this money, and he called him back to ask him about it, but Rabinovitch just told him to keep it, or something of that kind. A few months afterwards McCook says Rabinovitch gave him \$20, and from that time on up to the date of McCook's discharge by the company on July 10, 1914, Rabinovitch paid him moneys aggregating about \$50 a month. McCook stated in his evidence that Rabinovitch asked him a couple of times "to put more on," in reference to the amounts to be inserted by McCook in his orders which would form the basis of the accounts subsequently to be rendered by the accused to the company.

The particular payment charged in the indictment is said to have been made by the accused to McCook in June, 1914. McCook says that these payments were usually made to him by Rabinovitch on Portage Avenue or at the Queen's Hotel. He says that Rabinovitch paid him \$30 or \$40 in June, 1914; but that he cannot recall whether it was paid to him on the street or in the Queen's Hotel, nor is he able to fix the date of the payment

other than stating that he thinks it was during the latter part of June.

There is no evidence to connect Clingman with any of these alleged payments other than the suggestion that as a partner of Rabinovitch he must have known whatever Rabinovitch was doing in reference to the firm business.

Rabinovitch denies that he ever paid anything to McCook in connection with his dealings. He shews by his evidence that he was away from Winnipeg from June 16 to June 19, and that he went away again on June 25 to the Pacific Coast and was away till July 6. Still, he was in Winnipeg from the 19th to the 25th. He did not deny McCook's statement that he had asked McCook "to put more on" the box account, but this may have been because he was not asked about it by his counsel.

In attempting to decide between the evidence given by these two men, the credibility to be given to McCook is, of course, greatly weakened by the fact that he is a confessed criminal, and has been carrying on a systematic robbery of his employer for some years. Furthermore, his statements in regard to the particular instances of receiving money from Rabinovitch are indefinite. At the police court he stated that the first \$10 was simply given to him by Rabinovitch, whereas at this trial he stated that the money was placed in his pocket by Rabinovitch. Then, again, as to the alleged payment in June, 1914, McCook stated at the police court that the amount was \$40, whereas at this trial he said \$30. On the other hand, one is confronted with the question, what possible motive could McCook have had for overcharging his employer, unless he derived some benefit from it?

There is no doubt whatever that the prices fixed by McCook to be charged by the accused for the boxes delivered to the Ashdown Company were frequently double and treble and quadruple the amounts which the accused were properly entitled to charge. The moneys payable for the boxes did not go through McCook's hands in the shape of cash, but were all paid by cheque delivered at the office to one of the accused. That McCook should have carried on such a system of overcharges without receiving any benefit from the accused is impossible to believe. He was apparently the only employee of the Ashdown Company who had any accurate knowledge of the proper prices to be paid for these

boxes, but he took the precaution of keeping his order books locked up in a drawer of his desk, so that nobody else could get at them until on one or two occasions in June, Mr. Dykes, the manager of the company, pried open the drawer and discovered the overcharges which were being made. McCook's evidence in this case must be treated, I think, as the evidence of an accomplice in the crime charged, and it should not be accepted without corroboration. But Rabinovitch knew just as well as McCook did that the figures fixed by McCook were gross overcharges, and that Rabinovitch and his partner were receiving the benefit of such overcharges. Rabinovitch himself made out the accounts under which he knew he was charging double and treble the right amounts. If he, as an honest man, considered that the figures were wrong and that gross mistakes were being made month by month in his favour by McCook, surely it would have been his duty to point them out to McCook; but no such thing happened.

I cannot resist the belief that McCook's evidence as to receiving these gifts month by month from Rabinovitch, and in particular receiving \$30 or \$40 from Rabinovitch in the month of June, 1914, is reasonable in itself. I do not attach much importance to a lack of definiteness in the particulars of time, place or amount, because I think that if such gifts were made frequently the parties would not make a careful note of them even in their own minds.

The question is whether McCook's evidence is sufficiently corroborated. The following facts appear to me to have an important bearing on this question of corroboration:—

Item 1.—The statement of account (ex. 3) rendered by the accused under the name of the Winnipeg Bottle and Metal Exchange is dated June 16, 1914. Amongst the items included in it is one of June 3rd. Upon that date a delivery was made by the accused, which is entered in the book of the receiver for the Ashdown Company as simply "103 empty boxes." It was shewn in evidence that Clingman nearly always made these deliveries, and that he neither required nor received any receipt for the boxes he delivered. When these boxes were sent upstairs to McCook he expanded them as follows:—

28 boxes, at 50 cents	\$14.00
31 boxes, at 60 cents	18.60

22 boxes, at 45 cents.....	9.90
15 boxes, at 40 cents.....	6.00
7 boxes, at 15 cents.....	1.05

On June 4, another delivery of "83 empty boxes" was expanded by McCook as follows:—

22 boxes, at 60 cents.....	\$13.20
14 boxes, at 50 cents.....	7.00
31 boxes, at 15 cents.....	4.65
13 boxes, at 45 cents.....	5.85
3 boxes, at 80 cents.....	2.40

The total number of boxes delivered, as shewn by the statement of June 16, is 490, and the amount charged is \$280, or at an average price of 57 cents apiece.

Item 2.—The statement of account rendered by the accused, and dated July 13, was also made up by Rabinovitch. The item dated June 17 is entered in the receiver's book as simply "192 empty boxes." McCook expands this in his order book as follows:—

28 boxes, at 15 cents.....	\$ 4.20
42 boxes, at 60 cents.....	25.20
34 boxes, at 80 cents.....	27.20
22 boxes, at 65 cents.....	14.30
18 boxes, at 50 cents.....	9.00
10 boxes, at 45 cents.....	4.50
37 boxes, at 40 cents.....	14.80

Item 3.—The account dated June 16 was given by Rabinovitch to Clingman, who attended the Ashdown Company and received a cheque for the amount.

Item 4.—As regards the account dated July 13, McCook had been discharged on July 10, so that he could not initial it. By this time the Ashdown Company had decided not to pay any more moneys to the accused until they made further investigation. Consequently, when Rabinovitch rang up Lockhart on July 15, inquiring why the account was not paid, Lockhart requested him to furnish a duplicate of his account, and says that Rabinovitch promised to do so; but he never did so; and the accused have never since made any attempt to collect the money.

Item 5.—The accused have never rendered any account for

boxes delivered during the first half of July, although several such deliveries took place.

Facts which tend to render more probable the truth of a witness's testimony on any material point are admissible in corroboration thereof, although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated: *Wilcox v. Gotfrey*, 26 L.T.N.S. 481.

In *Green v. McLeod*, 23 A.R. (Ont.) 676, the question arose as to whether certain evidence given by an administratrix had been sufficiently corroborated. Osler, J.A., says, at p. 678:—

“In my opinion it has been so corroborated. The language of the Act is very general. ‘Other material evidence’ is the expression, and this may be direct or may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement. . . . And as to the other sum received by her—indeed as to both—the fact of the deceased having survived her receipt of it for some fourteen months and having made no complaint of the defendant's conduct in connection with it, though he had ample opportunity of doing so, tells in her favour with equal force. These are circumstances which are material and which are relevant and which could not have been rejected. I think they amount to material evidence in corroboration of the defendant's evidence within the meaning of the Act.”

I am of opinion that the facts set forth in the various items of evidence above mentioned, and the inferences or probabilities fairly deducible therefrom, afford sufficient corroboration of the evidence given by McCook as to the payments received by him from Rabinovitch from time to time, and in particular to the payment of \$30 or \$40 in June, 1914.

With regard to Clingman, while I have the gravest doubt that he was not well aware of these payments alleged by McCook, I cannot say that the evidence is sufficient to connect him with knowledge of them. He was unable to read or write, and McCook does not in any way connect Clingman with any of the payments. I accordingly give him the benefit of the doubt as regards this third count.

For the above reasons, I find Rabinovitch guilty upon all four counts, and Clingman guilty upon the first and fourth counts but not guilty on the second and third.

Convictions accordingly.

CANADIAN CRIMINAL CASES.

22 boxes, at 45 cents.....
15 boxes, at 40 cents.....
7 boxes, at 15 cents.....

On June 4, another delivery
panded by McCook as follows:

22 boxes, at 60 cents
14 boxes, at 50 cents
31 boxes, at 15
13 boxes, at
3 boxes, at

The total
of June 16, is
price of \$

It
and
,

INDEX

VOLUME 23, CANADIAN CRIMINAL CASES.

ADVANCE.

48.

Alien enemies—Arrest by military authorities.

RE CHAMBYK 275

Naturalization—Effect—Discrimination as to civil rights.

QUONG WING V. THE KING 113

Regulation of business—Chinese laundries.

QUONG WING V. THE KING 113

Answer and Defence.

To specific charge—Rights of accused—Formal proceedings.

REX V. ROACH 28

Meaning of "Answer"—Criminal Code, sec. 786.

REX V. ROMER 235

Appeal.

Extension of time—Objection that appeal not competent—Cr. Code, (1906), sec. 1024.

MULVIHILL V. THE KING (ANNOTATED) 194

From summary conviction—Nearest place of sittings—District Court (Sask.).

REX V. GEORGET 341

From summary conviction—"Next sittings" under Cr. Code, sec. 749.

REX V. GEORGET 341

From summary conviction—Service of notice of appeal—Cr. Code sec. 750

REX V. McDERMOTT (ANNOTATED) 252

From summary conviction—Ten days limitation—Shewing correct date of conviction

REX V. PROKOPATE 189

Status of private prosecutor—Trial of indictment.

REX V. FRASER 140

Leave to appeal—Conviction for theft—Sufficiency of particulars.

REX V. LEMELIN 171

Locality of offence—Magistrate acting for two counties—Jurisdiction of County Court on appeal.

REX V. BRADY 35

Appeal—Continued.

Question of law—Corroborative evidence.

REX V. MCCLAIN 488

Questions of law—Refusal to postpone trial.

MULVIHILL V. THE KING 194

Recognizance for appeal—Summary conviction and fine—Cr. Code sec. 750.

REX V. McDERMOTT (ANNOTATED) 252

Rendering modified judgment on appeal—Sentence of whipping.

REX V. BOARDMAN 191

Reprieve of death sentence—Discretion of trial Judge—Proposed appeal to Privy Council from Provincial Court of Appeal.

REX V. COOK (No. 2) 86

Review of conviction on question of law—Sufficiency of evidence.

REX V. EDMUNDS 77

Service of notice of appeal—Recognizance.

REX V. McDERMOTT (ANNOTATION) 254

To Supreme Court (Can.)—Criminal case where dissent in Court below.

MINCHIN V. THE KING 414

Arrest.

Illegal arrest on first charge—Conviction made on second charge only—Dismissal of first charge.

REX V. HURST 389

Assault.

Indecent assault—Intent of ambiguous act shewn by words spoken—Cr. Code sec. 292.

REX V. LOUIE CHONG 250

Occasioning bodily harm—Trial without consent in Saskatchewan.

REX V. PROKOPATE 189

Bail and Recognizance.

Adjournment of preliminary enquiry by consent for more than eight days—Waiver.

REX V. SULLIVAN 174

Amendment of order or making new order.

REX V. GREIG 352

Bail under Cr. Code sec. 698.

REX V. GREIG 352

Recognizance to prefer indictment.

REX V. FRASER 140

Calling the bail upon the recognizance.

REX V. EDWARDS 296

Capital offence—Murder charge postponed by Crown.

REX V. RAE 266

Appeal—Continued.

Certificate of forfeiture—Conclusiveness.

REX V. EDWARDS 296

Direction for bail in lieu of committal for trial—Record.

REX V. DAIGLE 92

Discharge—Taking accused in charge after conviction—Change of sentence.

REX V. EDWARDS 296

Enforcement and estreat of recognizance—Calling the bail—Certificate of default.

REX V. SULLIVAN 174

Estreat—Ex parte judgment—Attack.

REX V. EDWARDS 296

Estreat—Quebec practice.

REX V. EDWARDS 296

Estreat—Sureties for the peace under justice's order.

REX V. WALKER 179

Finding sureties to keep the peace—Threats—Enforcement of recognizance—Parties to proceedings.

REX V. WALKER 179

Jurisdiction after committal when accused moved to jail out of district for safe custody.

REX V. GREIG 352

Justification of bail in criminal matters—Saskatchewan practice.

REX V. GREIG 352

Notice to sureties—Default of appearance.

REX V. SULLIVAN 174

Submitting names and particulars of bondsmen.

REX V. GREIG 352

Sufficiency of bail—Duty of Judge ordering bail.

REX V. GREIG 352

Sureties to keep the peace—Breach of condition.

REX V. WALKER 179

Treasonable offence.

REX V. ROWENS 340

Bribery.

Corrupt offer for official influence.

REX V. HOGG 228

Sale or purchase of official position—Reward for assistance to procure.

REX V. HOGG 228

Brokers.

Clearing house—Option deals.

BEAMISH V. RICHARDSON 394

Grain exchange—Sales on margin—Wagering contracts—Cr. Code
sec. 231.

BEAMISH V. RICHARDSON 394

Canada Evidence Act.

Adverse witness—Crown discrediting its own witness.

REX V. MAY 469

Comment on failure of accused to rebut testimony.

REX V. MAY 469

Certiorari.

Directing amendment of summary conviction—Stating the
offence—Practising dentistry.

REX V. SCHILLING 380

Jurisdiction—Want or insufficiency of evidence—Liquor law tak-
ing away certiorari.

REX V. DAVIS: EX PARTE MIRANDA 33

Notice of motion to quash conviction—Time limit.

RE ELLIOTT 162

Practice as to costs—Alternative procedure of appeal available—
Summary conviction under Criminal Code.

REX V. ROACH 28

Return of amended conviction—Depositions

REX V. WATCHMAN 362

Summary conviction bad on its face—Filing substituted con-
viction.

REX V. AIKENS 467

Summary conviction under liquor law—Weight of evidence.

REX V. DAVIS: EX PARTE MIRANDA 33

Summary trial for indictable offence—Crown's admission.

REX V. STECKLEY 263

Waiver—Notice of motion served too late—Enlargement of motion
by consent.

RE ELLIOTT 162

Chattel Mortgage.

Future crop—Seed-grain mortgages in Saskatchewan.

REX V. HOLDERMAN 369

Comment.

On failure of accused to rebut testimony—Canada Evidence Act.

REX V. MAY 469

Constitutional Law.

Railway companies—Smoke regulation—Municipal by-laws or
commission control. REX v. C.P.R. Co. 487

Regulation of business—Employment of white females in places
of business of Chinese or other Orientals—Provincial law prohibit-
ing with penalties. . QUONG WING v. THE KING 113

Continuance and Adjournment.

Criminal trial—Discretion of magistrate. REX v. TALLY 449

Postponement of trial—Cr. Code (1906), sec. 901.
MULVIHILL v. THE KING (ANNOTATION) 200

Summary trial by magistrate—Adjournment sine die for deliber-
ation. REX v. WILSON 256

Costs.

Certiorari proceedings—Offence against town ordinance—Unop-
posed motion. REX v. SULLIVAN 222

Courts.

Jurisdiction—Criminal Courts—Status of police magistrate—
"Sessions" Courts at Montreal. REX v. WALKER 179

Recognizance of bail in criminal Courts—Jurisdiction on estreat-
ing. REX v. EDWARDS 296

Terms and sessions—Power to change dates as to criminal Courts
—Constitution and organization of Court.

REX v. COOK 50

Criminal Code (1906).

Section	Page
2 (40)	437
162	228
163	228
196	203
206	339
216	271
228	89, 224
229	272
231	394, 395
238	265, 272
242	67, 69
244	67
291	449
292	250
295	189

Criminal Code (1906)—Continued.

Section	Page
399.....	362
599.....	224
641.....	325, 383
679.....	174
696.....	93
698.....	352, 353
710.....	28
714.....	178
715.....	236, 450
724.....	450
748.....	180
749.....	341
750.....	252
773.....	224
774.....	89, 224
776.....	172
778.....	236, 285
781.....	172, 224
786.....	236
797 (2).....	224
823.....	243
826.....	243
830.....	285
834.....	243
851.....	23
873A.....	460, 461, 489
874.....	489
876.....	489
901.....	194, 200
942.....	236
944.....	50
962.....	461
963.....	23
978.....	93
1002.....	1, 38
1013.....	224
1014.....	140, 194, 488
1016 (2).....	224
1019.....	415
1024.....	194
1060.....	191
1113.....	180, 297
1114.....	180, 297
1115.....	297
1121.....	259
1124.....	191, 450
1131.....	259

Criminal Information.

Application for leave to file—Charge of libel.

REX V. BURGESS 424

Dentists.

Practising without license.

REX V. SCHILLING 380

Unlawful practice—Mechanical dentistry—License.

REX V. CRUIKSHANKS 23

Unlawful practice—Several attendances on one person.

REX V. CRUIKSHANKS 23

Describing the Offence.

SEE INDICTMENT.

Disorderly Houses.

Charge of keeping—Summary trial without option.

REX V. BOOTH 224

Offence of keeping.

REX V. JEANNETTE JOHNSON 136

Offence of keeping—Stating place of offence.

REX V. MARCEAU 456

Election.

Speedy trial procedure—Effect of indictment on right to elect trial without jury.

REX V. COUNTY JUDGES CRIMINAL COURT 7

Against summary trial by magistrate—Subsequent election of speedy trial.

REX V. PRICE AND BURNETT 285

Record of Court holding speedy trial—Recital of facts affirming jurisdiction.

REX V. GUAY 243

Estoppel.

Inconsistent acts in judicial proceeding—Plea of guilty as bar to future contest of facts on appeal.

REX V. GILLIS 160

Prior increased punishment because of breach of recognizance—

Enforcement of recognizance.

REX V. WALKER 179

Consent to admit depositions in trial of another—Waiver.

REX V. DAIGLE 92

Evidence.

Corroboration—Accomplice—Indecency with male person—Cr. Code (1906), sec. 206.

REX V. WILLIAMS 339

Defendant's bank account—Relevancy on charge of theft of money.

MINCHIN V. THE KING 414

Disproving plea of guilty stated in summary conviction.

REX V. SWETT 272

Evidence—Continued.

Instruction as to reasonable doubt. REX V. SCHURMAN 365

Judicial records—Termination of criminal prosecution.
TAMBLYN V. WESTCOTT 391

Judgment in criminal case as evidence—Breach of recognizance.
REX V. WALKER 179

Record of Court holding speedy trial—Recital of facts affirming jurisdiction.
REX V. GUAY 243

Relevancy—Evidence disclosing a collateral crime to that charged.
MINCHIN V. THE KING 414

Extradition.

Stealing—Restitution of money taken from prisoner when arrested—Proving identity with money stolen.
UNITED STATES V. TOUNDER 76

False Pretences.

Elements of offence—Fraudulent contract—Pretended stock subscription.
REX V. DAIGLE 92

Fraudulently inducing execution of valuable security.
REX V. PRENTICE 436

Inferential pretence without express words.
REX V. HOLDERMAN 369

Fraud.

See FALSE PRETENCES.

Gaming.

Automatic gum-vending machine—Free checks with purchases—Inducement to re-play each check for more checks or blank—Whether gaming established.
REX V. LANGLOIS 43

Means of resisting police search—Common gaming house—Cr. Code sec. 641.
WAH KIE V. CALGARY AND CUDDY 325, 383

Pool selling—Betting—Jurisdiction of Police Magistrate.
REX V. HELLIWELL 146

Habeas Corpus.

Applicant out on bail—Non-disclosure.
RE BHAGWAN SINGH 5

Notice of motion—Alberta Crown Rules.
REX V. SWETT 272

Penitentiary regulations of 1898—Partial remission of sentence for good conduct.
REX V. HUCKLE 73

Serving notice on Attorney-General—Status of local agent of Attorney-General.
REX V. SWETT 272

Hard Labour.

Imprisonment at—Summary conviction under Indian Act (Can.)

REX V. ATKINSON 149

Homicide.

Accidental shooting—Hunting in close season.

REX V. OXLEY 262

Prisoner's letter requesting false answer to enquiry.

REX V. HAYNES 101

Husband and wife.

Non-support of wife or children—Summary proceedings—Wife
as a witness.

REX V. ALLEN (ANNOTATED) 67

Imprisonment.

At hard labour—Summary conviction under Indian Act (Can.)

REX V. ATKINSON 149

Place of—Common jail.

REX V. GOVERNOR OF CITY PRISON; EX PARTE GREEN 293

When ninety days exceeds three months' limit.

REX V. GOVERNOR OF CITY PRISON; EX PARTE GREEN 293

Indecency.

Criminal proceedings—Summary conviction—Uncertainty and
multiplicity.

REX V. ROACH 28

Indecent assault—Intent of ambiguous act shewn by words
spoken—Cr. Code sec. 292.

REX V. LOUIS CHONG 250

Indians.

Drunkenness on Indian Reserve—Indian Act (Can.).

REX V. ATKINSON 149

Sales to prohibited persons—Indian Act (Can.)

REX V. VERDI 47

Indictment, Information and Complaint.

Endorsing names of Crown witnesses—Formal charge where no
grand jury system.

REX V. McCLAIN 488

Trial of indictment—Status of private prosecutor.

REX V. FRASER 140

True bill found—Effect on subsequent action for damages.

RICHARD V. GOULET 327

Charge of vagrancy—Essentials of offence—Wanderer without
means of subsistence.

REX V. KOLENCZUK 265

Evidence—Continued.Instruction as to reasons¹*Continued.**wearing.*

REX V. TALLY 449

Judicial record²*General in Alberta and Saskatchewan.*

REX V. WEISS 460

Judge

Sufficiency—Amendment.

RICHARD V. GOULET 327

Charge—Information treated as formal charge or indictment—

REX V. DAIGLE 92

*Special trial.**Requisites—Leave to prefer formal charge.*

REX V. WEISS 460

Sufficiency of description of offence—Common assault.

REX V. TALLY 449

Information.

See INDICTMENT.

Instruction.

To jury—Inaccuracy in Judge's charge—Prejudice.

REX V. HAYNES 101

Reasonable doubt.

REX V. SCHURMAN 365

Intoxicating Liquors.

Drunkenness on Indian reserve—Indian Act (Can.)

REX V. ATKINSON 149

Keeping liquor for sale—Statutory presumptions.

REX V. NERO 167

Sale by employee of license-holder to person of prohibited class—

Criminal liability of employer.

REX V. VERDI 47

Sales to prohibited persons—Indian Act (Can.)

REX V. VERDI 47

Trial of offender—Absent defendant—Plea of guilty by counsel.

REX V. THOMPSON 463

Trial of offenders—Exclusive jurisdiction of town stipendiary
magistrate—Nova Scotia Temperance Act, 1900.

REX V. CODY 211

Unlawful sales—Liability of principal for offence of agent.

REX V. LABRIE 349

Unlawful sales—Liability of proprietor or occupant—Employee
acting as customer's agent to buy.

O'SULLIVAN V. MICHUS 169

Intoxicating Liquors—Continued.

Unlawful sales—Provincial criminal law—Criminal offence.

REX V. CODY 211.

Unlawful sales—Shop licenses—Minimum quantity in unbroken packages.

SMITH V. GALPIN 318

Unlawful sales—Temperance drinks — Intoxicating principle — Quebec License law.

CORRIVEAU V. SIMARD 156

Justice of the Peace.

Appointment—Territorial jurisdiction.

REX V. CODY 211

Exclusive jurisdiction of first justice taking cognizance of case—

Implied request to second justice to act.

REX V. TALLY 449

Jurisdiction—N.S. Temperance Act.

REX V. COADY 434

Jurisdiction—Sitting at request of another justice.

REX V. CRUIKSHANKS 23

Jurisdiction also as summary trial magistrate—Summary conviction or summary trial procedure.

REX V. BELMONT 89

Protection order on quashing warrant—Cr. Code sec. 1131.

REX V. PEART 259

Leave to Appeal.

See APPEAL.

Libel.

Criminal information for—Application for leave to file.

REX V. BURGESS 424

Liquor License Law.

See INTOXICATING LIQUORS.

Malicious Prosecution.

Reasonable and probable cause—Advice of counsel.

RICHARD V. GOULET 327

Termination—Quashing on technical grounds.

RICHARD V. GOULET 327

Termination of prosecution—Proof without production of record.

TAMBLYN V. WESTCOTT 391

True bill found—Effect on subsequent action for damages.

RICHARD V. GOULET 327

Municipal Corporations.

By-law against drunkenness in public places—Remedying omission to affix seal—Conviction for offence prior to sealing.

REX V. FAUX 75

New Trial.

Misdirection as to law. REX V. HOLDERMAN 369

Misdirection as to reasonable doubt. REX V. SCHURMAN 365

Nolle Prosequi.

Effect of entering. RICHARD V. GOULET 327

Oaths.

In form customary with persons of witness' race or belief.

REX V. SHAJOO RAM 334

Perjury.

Statutory corroboration—"Material particular"—Cr. Code 1002—

Knowledge of falsity. REX V. NASH 38

Preliminary Inquiry.

Caption to depositions. REX V. MCCLAIN 488

Replacement of magistrate. REX V. DAIGLE 92

Procuring.

Prostitution—Cr. Code 216. REX V. CARDELL 271

Protection Order.

On quashing justice's warrant—Cr. Code sec. 1131.

REX V. PEART 259

Punishment.

Greater punishment for subsequent offence—Cr. Code secs. 851,

963. REX V. CRUIKSHANKS 23

Railways.

Obstruction of street crossing—Standing cabs—Operation of
gates. REX V. G.T.R. Co. 80

Smoke regulation—Constitutional law. REX V. C.P.R. Co. 487

Receiving.

SEE THEFT.

Recognizance to Prefer Indictment.

Prosecution assumed by Crown—Private prosecutor.

REX V. FRASER 140

Record.

Of sentence—Punishment by whipping—Statutory directions for
medical supervision. REX V. BOARDMAN 191

Reprieve.

Death sentence—Discretion of trial Judge—Proposed appeal to
Privy Council from Provincial Court of Appeal.

REX V. COOK (No. 2) 86

Search and Seizure.

Force in executing search warrant.

WAH KIE V. CALGARY AND CUDDY 325, 383

Search warrant on gaming-house charge—Producing warrant.

WAH KIE V. CALGARY AND CUDDY 325, 383

Secret Commissions.

Employee receiving secret commission—Criminal offence—Railway freight conductor “spotting” cars.

REX V. HOWES 358

False statement in writing—Collusive fixing of price by employee.

REX V. RABINOVITCH 496

Sentence and Imprisonment.

Excessive fine on summary trial—Cr. Code sec. 781.

REX V. BOOTH 224

Hard labour.

REX V. MORTON 172

Imprisonment and whipping—Illegality of direction as to time of whipping.

REX V. BOARDMAN 191

Partial remission of sentence for good conduct in prison—Power to revoke or forfeit.

REX V. HUCKLE 73

Running of sentence—Convict allowed at liberty on bail pending appeal—Quashing of appeal.

REX V. RAFF 203

Running of sentence on summary conviction.

ROBINSON V. MORRIS 209

Speedy Trials.

Electing trial without jury—Effect of indictment.

REX V. COUNTY JUDGE'S CRIMINAL COURT 7

Option of non-jury trial—Cr. Code sec. 826.

REX V. GUAY 243

Changing option—Cr. Code sec. 826.

REX V. GUAY 243

Statutes.

Amending statutes—New section introduced with number and letter designation—Criminal Code.

REX V. ALLEN (ANNOTATED) 67

Interpretation—Recurring phrases in same statute.

REX V. ROMER, ETC. 235

Stay of Proceedings.

In criminal prosecution—Cr. Code sec. 962.

REX V. WEISS 461

Summary Convictions.

- Amending commitment—Cr. Code sec. 1121.
REX V. PEART 259
- Defect in information cured by depositions.
REX V. TALLY 449
- Enforcement of fine—Costs of commitment—Indian Act (Can.)
REX V. VERDI 47
- Form—Date of offence.
REX V. TALLY 449
- Imprisonment in default of paying fine—Special Act.
REX V. SCHILLING 380
- Irregular plea—Statement of accused in answer to charge.
REX V. SWETT 272
- Irregularity in information—Waiver by failure to object.
REX V. TALLY 449
- Limitation of charge and evidence to one specific offence.
REX V. ROACH 28
- Locality of offence not shewn—Territorial jurisdiction.
REX V. AIKENS 467
- Procedure on charge of second offence with added penalty.
REX V. CRUIKSHANKS 23
- Special Act making fine payable to magistrate—Formal conviction.
REX V. SCHILLING 380
- Territorial jurisdiction of magistrate—Inconvenient place of trial.
REX V. TALLY 449
- Trial—Appearance by counsel only.
REX V. ROMER 235
- Summary Trial.**
- Accused to be personally present.
REX V. ROMER 235
- Assault occasioning bodily harm—Trial without consent in Saskatchewan.
REX V. PROKOPATE 189
- Consent to summary trial.
REX V. HELLIWELL 146
- Full answer and defence.
REX V. ROMER 235
- Jurisdiction absolute without consent in certain provinces.
REX V. MORTON 172
- Without consent—When magistrate to declare procedure.
REX V. ROMER 235

Sunday.

Sports and amusements—Skating rink—Franchise to club under Quebec statute. REX V. "THE STADIUM" 84

Theft.

Embezzlement—Various defalcations as one continuous act. MINCHIN V. THE KING 414

Recent possession—Evidence. REX V. MCCLAIN 488

Receiving stolen goods—Alleging the theft. REX V. WATCHMAN 362

Trial.

Comment on failure of accused to rebut testimony—Canada Evidence Act. REX V. MAY 469

Counsel stating or reading the law to the jury. REX V. COOK 50

Two persons separately charged on identical evidence—Intermixing of trials. REX V. TALLY 449

Crown witnesses at preliminary inquiry—Witnesses at trial. REX V. MCCLAIN 488

Discretion—Re-calling witness on collateral issue as to credit. REX V. PRENTICE 436

Electing trial without jury—Accused not committed for trial but bailed to answer to jury Court. REX V. DAIGLE 93

Homicide—Instruction to jury—Prisoner's letter requesting false answer to enquiry—Explaining possession of money. REX V. HAYNES 101

Instruction—Inaccuracy in Judge's charge—Prejudice. REX V. HAYNES 101

Instruction as to reasonable doubt. REX V. SCHURMAN 365

Speedy trial procedure—Electing trial without jury—Effect of indictment. REX V. COUNTY JUDGE'S CRIMINAL COURT 7

Vagrancy.

Essentials of offence—Wanderer without means of subsistence. REX V. KOLENCZUK; REX V. CHUPAK 265

Venue.

Criminal prosecutions—Non-indictable offences—Provincial law. REX V. BRADY 35

Waiver.

Rights of accused—Consent to admit depositions in trials of other similarly concerned. REX V. DAIGLE 92

Irregularity in information—Waiver by failure to object. REX V. TALLY 449

Whipping.

Punishment—Sentence.

REX V. BOARDMAN 191

Witnesses.

Competency—One of two jointly charged pleading guilty.

REX V. McCLAIN 488

Competency of wife in crime committed by husband against her—
Criminal non-support—Cr. Code, sec. 242A.

REX V. ALLEN (ANNOTATION) 70

Corroboration—Charge of forgery—Cr. Code 1906, sec. 1002.

REX V. SCHELLER 1

Corroboration—Criminal charge—Indecent assault.

REX V. FONTAINE 159

Corroboration—Prisoner's testimony on perjury charge—Incon-
sistencies with former testimony.

REX V. NASH 38

Corroborative testimony—Prior fact otherwise irrelevant—Admis-
sibility.

REX V. RABINOVITCH 496

Cross-examination in criminal cases—Direction of Court to call
alleged associate in the offence.

REX V. HAZEL AND WESTLAKE 151

Crown discrediting its own witness on criminal trial—Adverse
witness—Canada Evidence Act, sec. 9.

REX V. MAY 469

Disclosing to accused before trial names of witnesses against him.

REX V. McCLAIN 488

Privilege—Authorization of solicitor's act.

REX V. PRENTICE 436

Wife as witness against husband—Criminal law—Non-support
triable under summary conviction procedure.

REX V. ALLEN (ANNOTATED) 67

Words and Phrases.

"Answer"	236
"Chinaman"	114
"Criminal offence"	211
"Full answer and defence"	236
"Material particular"	38
"Next sittings."	341
"Practising"	23
"Statement of accused"	488
"Threatened"	449
"Valuable security"	437

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